

No. 12099

United States
Court of Appeals
for the Ninth Circuit

GEORGE H. GRAHAM,

Appellant,

vs.

ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY COMPANY, a corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Southern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

| | PAGE |
|---|------|
| Answer | 6 |
| Appeal: | |
| Cash Bond on | 19 |
| Certificate of Clerk to Transcript of Record on | 24 |
| Designation of Papers for Record on..... | 23 |
| Designation of Points on Which Appellant Will Rely on (DC) | 21 |
| Designation of Points on Which Appellant Will Rely on (USCA) | 268 |
| Notice of | 18 |
| Cash Bond on Appeal | 19 |
| Certificate of Clerk to Transcript of Record on Appeal | 24 |
| Complaint for Damages | 2 |
| Demand for Jury Trial | 9 |
| Designation of Papers for Record on Appeal... | 23 |
| Designation of Points on Appeal: | |
| Appellant's (DC) | 21 |
| Appellant's (USCA) | 268 |
| Judgment on Directed Verdict..... | 15 |

Minute Orders:

| | |
|---|----|
| Aug. 17, 1948—Trial | 11 |
| Aug. 18, 1948—Trial | 12 |
| Aug. 19, 1948—Trial; Order Granting Motion for Directed Verdict and Verdict..... | 13 |

| | |
|---|----|
| Motion for New Trial and Notice of Said Motion and Hearing Thereof | 16 |
|---|----|

| | |
|---------------------------------------|---|
| Names and Addresses of Attorneys..... | 1 |
|---------------------------------------|---|

| | |
|------------------------|----|
| Notice of Appeal | 18 |
|------------------------|----|

| | |
|---|----|
| Order Denying Motion for New Trial..... | 18 |
|---|----|

| | |
|--|----|
| Order Granting Motion for Directed Verdict (Minute Order of Aug. 19, 1948)..... | 13 |
|--|----|

Statement of Points on Appeal:

| | |
|------------------------|----|
| Appellant's (DC) | 21 |
|------------------------|----|

| | |
|--------------------------|-----|
| Appellant's (USCA) | 268 |
|--------------------------|-----|

| | |
|---------------------------------|-------|
| Substitution of Attorneys | 9, 10 |
|---------------------------------|-------|

| | |
|------------------------------|----|
| Transcript, Reporter's | 25 |
|------------------------------|----|

Exhibits for Defendant:

| | |
|---|-----|
| G—Release of Claim dated 10/11/45 signed by George H. Graham | 179 |
|---|-----|

| | |
|--|-----|
| J—Letter dated 2/20/46, G. H. Graham to A. J. Smith, Superintendent, and E. C. Charles, Claim Adjuster | 201 |
|--|-----|

Exhibit for Plaintiff:

| | |
|---|-----|
| 5—Letter dated Nov. 25, 1947, to Sievert & Ewing from Philander, Brooks & Beadle | 262 |
|---|-----|

Transcript, Reporter's—(Cont'd)

Witness for Defendant:

Soto-Hall, Ralph

| | |
|-----------------|-----|
| —direct | 221 |
| —cross | 229 |
| —redirect | 239 |
| —recross | 239 |

Witnesses for Plaintiff:

Graham, George H.

| | |
|-----------------|--------------|
| —direct | 25 |
| —cross | 79, 174, 200 |
| —redirect | 240 |
| —recross | 245 |

Niemand, Frederick G.

| | |
|-----------------|-----|
| —direct | 135 |
| —cross | 154 |
| —redirect | 170 |
| —recross | 172 |

Syock, Arthur Ralph

| | |
|---------------|-----|
| —direct | 249 |
| —cross | 257 |

| | |
|---------------|----|
| Verdict | 14 |
|---------------|----|

NAMES AND ADDRESSES OF ATTORNEYS

PHILANDER BROOKS BEADLE, Esq.,

ERNEST E. EMMONS, JR., Esq.,

1095 Market Street,

San Francisco, California.

Attorneys for Plaintiff and Appellant.

GUS L. BARATY, Esq.,

GEORGE AARON SMITH, Esq.,

111 Sutter Street,

San Francisco, California.

Attorneys for Defendant and Appellee.

In the District Court of the United States for the
Northern District of California, Southern Division

No. 26368-H

GEORGE H. GRAHAM,

Plaintiff,

vs.

ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY COMPANY, a corporation, FIRST DOE
and SECOND DOE,

Defendants.

COMPLAINT FOR DAMAGES

Now comes plaintiff above-named, and for cause
of action against defendants, alleges as follows:

I.

That the defendants, First Doe and Second Doe
are sued and designated herein by fictitious names
for the reason that their true names are unknown
to this plaintiff, but that plaintiff will, upon as-
certaining their true names, substitute the same
for such fictitious names by proper amendment.

II.

That the defendant Atchison, Topeka and Santa
Fe Railway Company, a corporation was and is
organized and existing under the laws of the State
of Kansas, and doing business in the State of Cali-
fornia and other states, and that at all time herein
mentioned said defendant was engaged in the busi-
ness of a common carrier by a railway in interstate
commerce in the State of California and other
states.

III.

That at all times herein mentioned the defendant corporation was a common carrier by railway and interstate [1*] commerce and that said plaintiff was employed by said defendant in interstate commerce and the injuries to the plaintiff herein complained of arose in the course of and while the plaintiff and defendant were engaged in the conduct of interstate commerce.

IV.

That at all times herein mentioned, First Doe and Second Doe were agents, servants and employees of the defendant corporation and as such did act in the course and scope of their employment.

V.

That this action is brought under and by virtue of the provisions of the Federal Employer Liability Act, 45 U.S.C.A., 51, et seq.

VI.

That the plaintiff, at all times herein mentioned, was employed by the defendant corporation as a freight brakeman, in the defendant corporation's railroad yards in the City of Needles, County of San Bernardino, of the State of California.

VII.

That on or about the 6th day of July, 1945, at or about the hour of 1:30 a.m. o'clock of said day, while the plaintiff was employed as aforesaid in

* Page numbering appearing at foot of page of original certified Transcript of Record.

the defendant's railroad yards in the City of Needles, County of San Bernardino, and in the regular course and scope of this employment as a freight brakeman, the said plaintiff was required to and he did ride and stand on a caboose on the number 20 track in said yard, and that at said time and place, said caboose was stopped on said track number 20; that defendants did owe the plaintiff the duty of exercising ordinary care to provide him with a reasonably safe place in which to work and maintain any other cars or locomotives [2] on said track at a sufficiently safe distance from said caboose and to operate other cars and locomotives in said yard and in particular over and along said track 20 in a careful and prudent manner; that the said defendants did negligently and carelessly fail to maintain a reasonably safe distance between the caboose on which said plaintiff was standing and other cars and locomotives being driven and operated on said track number 20, and did fail to operate other cars and locomotives carefully on said track.

VIII.

That as a direct and proximate result of said negligence and carelessness, the said defendants did carelessly and negligently drive and operate a locomotive and other cars on said track number 20, so as to cause the same to and they did collide violently with the caboose on which the plaintiff was standing, causing the said plaintiff to be thrown about said caboose with such force and violence that he struck some portion thereof, the exact portion

being unknown to him, and as a result thereof said plaintiff was cut, bruised, lacerated and shocked, injured and made sick, sore and lame, both internally and externally, and more particularly injured as follows: spinal injury in the lumbo sacral region; severe shock to the nervous system; numerous contusions, bruises and abrasions about the head, arms, body and legs; all of which injuries plaintiff is informed and believes and therefore alleges are of a permanent nature.

IX.

That by reason of said negligence and carelessness as aforesaid, plaintiff has sustained general damages in the sum of Fifty Thousand Dollars (\$50,000.00).

V.

That said plaintiff has incurred indebtedness for medical care and attention reasonably required to treat the said injuries, in an amount not known at the present time; [3] and plaintiff prays leave, upon ascertaining said amount to amend this complaint to insert said amount; that the plaintiff will be compelled to incur in the future an additional indebtedness for medical care and attention to be rendered to the said plaintiff in the future to treat said injuries in an amount unknown at the present time, and plaintiff prays leave, upon ascertaining said amount to amend this complaint to insert said amount.

XI.

That at the time of said injuries the plaintiff was employed regularly by the said defendant cor-

poration as a freight brakeman and earning the sum of \$450.00 per month; that as a result of said injuries, plaintiff was compelled to leave his employment and was unable to work at his regular employment for a period of four months, and plaintiff is informed and believes and therefore alleges that he will be unable to work at his regular employment for an unknown period of time in the future; that plaintiff prays leave upon ascertaining the amount of his damages as a result of his loss of employment, to amend this complaint to insert said unknown amount.

Wherefore, plaintiff prays judgment as follows: that plaintiff be awarded judgment in the sum of Fifty Thousand Dollars (\$50,000.00); that plaintiff be allowed to file an amended complaint herein in accordance with the allegations of this complaint; that plaintiff have and recover special damages as herein set forth; that plaintiff have and recover his costs incurred herein; and, for such other and further relief as may be just and equitable in the premises.

HAROLD C. BROWN,
SAUL PERLIS,
Attorneys for Plaintiff.

(Duly Verified.)

[Endorsed]: Filed Aug. 30, 1946. [4]

[Title of District Court and Cause].

ANSWER

Defendant, The Atchison, Topeka and Santa Fe Railway Company, for answer to plaintiff's complaint, admits, denies, and alleges:

I.

Defendant denies each and every, all and singular, the allegations contained in Paragraphs VII and VIII of the Complaint.

II.

With respect to Paragraphs IX of the Complaint, defendant denies that plaintiff has been damaged by any negligence or carelessness of defendant; and further denies that plaintiff has been damaged in the sum of Fifty Thousand Dollars (\$50,000.00), or in any amount, or at all.

III.

With respect to Paragraph X of the Complaint, defendant denies each and every, all and singular, the allegations therein contained. [6]

IV.

With respect to Paragraph XI of the Complaint, defendant admits that plaintiff was employed by it as a freight brakeman; alleges that it is not now able to state the exact amount of his monthly earnings, but will produce the same at any trial of said action; and that with respect to the remaining allegations of said Paragraph XI, defendant is without sufficient knowledge to form a belief as to the truth of said allegations and, therefore, denies each and every, all and singular, the allegations in said paragraph contained and not heretofore specifically admitted.

Wherefore, the defendant prays judgment that plaintiff take nothing, and for its costs herein incurred.

FIRST SEPARATE DEFENSE

Defendant, for its first separate defense to plaintiff's Complaint on file herein, alleges that at the time and place alleged in the Complaint plaintiff failed to exercise ordinary care for his own safety under conditions then existing, which lack of care on his part proximately caused or contributed to any injury or damage suffered by him; that any injury or damage suffered by plaintiff was proximately caused or contributed to by plaintiff's negligence.

Wherefore, defendant prays, that in the event any damages are awarded plaintiff herein, the amount thereof be reduced in proportion to plaintiff's contributory negligence.

SECOND SEPARATE DEFENSE

For its separate and further defense, defendant alleges that on the 1st day of October, 1945, and after the injuries set up in the Complaint, but before the commencement of this action, and for valuable consideration paid to plaintiff, the plaintiff released defendant from all liability to the plaintiff by reason of the injuries received by plaintiff as [7] alleged in the Complaint.

Wherefore, defendant prays judgment against plaintiff, that plaintiff take nothing, and for its costs herein incurred.

LEO E. SIEVERT,

CHARLES L. EWING,

By /s/ CHARLES L. EWING,

Attorneys for Defendant.

(Affidavit of Service by Mail.)

[Endorsed]: Filed Sept. 25, 1946. [8]

[Title of District Court and Cause].

DEMAND FOR JURY TRIAL

To the Clerk of the District Court of the United States for the Northern District of California, Southern Division; Defendant, Atchison, Topeka and Santa Fe Railway Company, a corporation; and, Leo E. Sievert and Charles L. Ewing, its Attorneys:

You and each of you will please take notice that the plaintiff, George H. Graham, does hereby demand a trial by jury of the above-entitled action.

Dated this 24th day of September, 1946.

HAROLD C. BROWN,
SAUL PERLIS,
Attorneys for Plaintiff.

(Affidavit of Service by Mail.)

[Endorsed]: Filed Sept. 26, 1946. [9]

[Title of District Court and Cause].

SUBSTITUTION OF ATTORNEYS

The plaintiff, George H. Graham, hereby substitutes Emmett R. Burns as his attorney in the above entitled action, in the place and stead of Harold C. Brown, Esq., and Saul Perlis, Esq.

Dated this 28th day of February, 1947.

GEO. H. GRAHAM.

We hereby consent to the substitution of Emmett R. Burns as attorney for the plaintiff George H.

Graham, in the above entitled action, in our place and stead.

Dated this 26th day of February, 1947.

/s/ HAROLD C. BROWN,

/s/ SAUL PERLIS.

I hereby agree to be substituted in the place of Harold C. Brown and Saul Perlis, Esq., in the above entitled action, as attorney for the plaintiff, George H. Graham.

Dated this 26th day of February, 1946.

/s/ EMMETT R. BURNS.

[Endorsed]: Filed April 28, 1947. [10]

[Title of District Court and Cause].

SUBSTITUTION OF ATTORNEYS

The plaintiff, George H. Graham, hereby substitutes Philander Brooks Beadle and Ernest E. Emmons, Jr., as my attorney in the above entitled action in the place and stead of Emmett R. Burns.

Dated: October 27, 1947.

GEO. H. GRAHAM,

Plaintiff.

I hereby consent to the substitution of Philander Brooks Beadle and Ernest E. Emmons, Jr., as attorneys for plaintiff in the above entitled action, in my place and stead.

Dated this 8th day of November, 1947.

/s/ EMMETT R. BURNS.

We hereby agree to be substituted in the place of Emmett R. Burns as attorneys for the plaintiff.

Dated this 31st day of October, 1947.

/s/ PHILANDER BROOKS BEADLE

/s/ ERNEST E. EMMONS, JR.

[Endorsed]: Filed Nov. 24, 1947. [11]

District Court of the United States, Northern
District of California, Southern Division

At a stated term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 17th day of August, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Louis E. Goodman, District Judge.

[Title of Cause.]

TRIAL JURY IMPANELED

This case came on regularly this day for trial. Ernest E. Emmons, Esq., was present on behalf of the plaintiff, and George Smith, Esq., and Gus Baraty, Esq., were present on behalf of the defendant. Thereupon the following named persons, viz: Jesse B. Turner, Albert W. Shaw, James L. Collins, Milton T. Bryant, William Soto, Mrs. Mary M. Dart, Herbert G. Bull, Emory C. Neal, Fred K. Berger, Luetta G. Michael, Peter G. Quinn, Jr., and

Mrs. Hetty-Belle Marcus, twelve good and lawful jurors, after being duly examined under oath, were accepted and sworn to try the issues joined herein. Mr. Emmons and Mr. Baraty made opening statements to the Court and jury on behalf of the plaintiff and the defendant, respectively. George H. Graham was sworn and testified on behalf of the plaintiff, and Mr. Emmons introduced Plaintiff's Exhibit No. 1, which was admitted in evidence. The hour of adjournment having arrived, the Court, after duly admonishing the jury, Ordered the further trial hereof continued to August 18, 1948.

District Court of the United States, Northern
District of California, Southern Division

At a stated term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 18th day of August, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Louis E. Goodman, District Judge.

[Title of Cause.]

TRIAL RESUMED

The parties hereto and the jury heretofore impaneled herein being present as heretofore, the further trial of this case was resumed. George H. Graham was recalled and further testified, and

Frederick G. Niemand was sworn and testified on behalf of the plaintiff. Mr. Emmons introduced Plaintiff's Exhibits Nos. 2, 3, and 4, which were admitted in evidence. Mr. Baraty introduced Defendant's Exhibits A, B, E, F, and I, which were marker for identification, and C, D, G, and H, which were admitted in evidence. The hour of adjournment having arrived, **the Court, after duly** admonishing the jury, Ordered the further trial of this case continued to August 19, 1948. [13]

District Court of the United States, Northern
District of California, Southern Division

At a stated term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 19th day of August, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Louis E. Goodman, District Judge.

[Title of Cause.]

(Trial Resumed.)

ORDER MOTION FOR DIRECTED VERDICT
FOR DEFENDANT GRANTED, VERDICT.

The parties hereto and the jury heretofore impaneled herein being present as heretofore, the further trial of this case was resumed. George H. Graham was recalled and further testified, and

Arthur Ralph Syock was sworn and testified on behalf of the plaintiff. Mr. Emmons introduced Plaintiff's Exhibit No. 5, which was admitted in evidence. Ralph Soto-Hall was sworn and testified on behalf of the defendant, and Mr. Baraty introduced Defendant's Exhibits J, K, L, M, N, and P, which were admitted in evidence, and Defendant's Exhibit O, which was marked for identification purposes only. The plaintiff thereupon rested. Mr. Baraty made a motion for a directed verdict for the defendant, and after hearing the attorneys herein, it is Ordered that said motion be and it is hereby granted. The Court thereupon appointed juror Number One as Foreman and directed that said juror sign a formal verdict. Said juror thereupon signed the verdict in the following form: "We, the Jury, find in favor of the Defendant upon the direction of the Court. Jesse B. Turner, Foreman." The Court thereupon Ordered that judgment be entered for the defendant upon the directed verdict, and the jury was excused from further service herein. [14]

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Defendant upon the direction of the Court.

JESSE B. TURNER,
Foreman.

[Endorsed]: Filed at 3 o'clock and 55 Min. p.m.
Aug. 19, 1948. [15]

In the Southern Division of the United States
District Court for the Northern District of
California.

No. 26368-G

GEORGE H. GRAHAM,

Plaintiff,

vs.

ATCHISON, TOPEKA AND SANTA FE RAIL-
WAY COMPANY, a corporation,

Defendant.

JUDGMENT ON DIRECTED VERDICT

This cause having come on regularly for trial on the 17th day of August, 1948, being a day in the July 1948 Term of this Court, before the Court and a Jury of twelve persons, duly impaneled and sworn to try the issues joined herein; Ernest E. Emmons, Esq., appearing as attorney for plaintiff, and George Smith, Esq., and Gus Baraty, Esq., appearing as attorneys for defendant; and the trial having been proceeded with on the 17th, 18th, and 19th days of August in said year and term, and oral and documentary evidence upon behalf of the respective parties having been introduced and closed, and the Court having granted defendant's motion for a directed verdict, and after the instructions by the Court the jury having rendered the following verdict, which was ordered recorded, viz: "We, the Jury, find in favor of the Defendant upon the direction of the Court. Jesse B. Turner, Foreman," and the Court having ordered that

judgment be entered in accordance with said verdict;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by his complaint herein. [16]

Judgment filed this 20th day of August, 1948.

/s/ C. W. CALBREATH,
Clerk.

Entered in Civil Docket Aug. 21st, 1948.

[Endorsed]: Filed Aug. 20, 1948.

[17]

[Title of District Court and Cause.]

**MOTION FOR NEW TRIAL AND NOTICE OF
SAID MOTION AND HEARING THEREOF**

To the Defendant above named and to its Attorneys:

You Are Each Hereby Notified that on Monday, August 30, 1948, at the hour of 10 o'clock a.m. on said day, or as soon thereafter as counsel can be heard, the plaintiff above named, by his attorneys, will move the above entitled Court, the division thereof presided over by Honorable Louis E. Goodman, Judge of the United States District Court, at the courtroom of said Court in the U. S. Post Office Building, 7th and Mission Streets, in the City and County of San Francisco, State of California, for an order setting aside the verdict and judgment herein in favor of defendant and granting to plaintiff a new trial. Attached hereto, marked

Exhibit "A", and herein incorporated is a draft of the order which plaintiff proposes.

Said motion will be made on this motion and notice thereof, all of the records, papers and files herein including the minutes of the Court, and all the testimony taken therein.

Said motion will be made severally on each of the grounds herein stated and as follows:

1. Error in law in granting the motion of defendant for a directed verdict.

(a) The issue presented was one of fact for the jury to decide.

2. The evidence is insufficient to sustain the verdict.

3. The verdict is against the weight of the evidence.

4. The verdict is against the law. [8]

Wherefor, it is moved and will be moved and is prayed that the verdict and judgment be set aside and a new trial be granted to plaintiff George H. Graham.

/s/ PHILANDER BROOKS
BEADLE,

/s/ ERNEST E. EMMONS, JR.,
Attorneys for Plaintiff.

(Acknowledgment of Receipt of Copy.)

(Here follows Exhibit "A"—Order Granting New Trial [Not Signed])

[Endorsed]: Filed Aug. 25, 1948.

[19]

[Title of District Court and Cause.]

**ORDER DENYING MOTION FOR
NEW TRIAL**

After the completion of plaintiff's case upon the trial herein, the Court directed a verdict in favor of the defendant. The directed verdict was ordered because the Court found that no evidence of any kind had been presented showing or indicating that the agreement of release and settlement made by the parties was due to either mutual mistake or fraud. Nor was there any evidence from which any inference of mistake or fraud could be drawn. Hence no factual issue required resolution by the Jury.

Re-examination of the question following plaintiff's motion for a new trial does not disclose that the Court committed any error in directing the verdict. Consequently the motion for a new trial is hereby denied.

Dated September 20, 1948.

LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Sept. 20, 1948.

[20]

[Title of District Court and Cause.]

**NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS**

Notice Is Hereby Given that plaintiff, George H. Graham, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the

judgment entered herein on August 21, 1948, and from the whole thereof, and from the order entered herein on September 20, 1948, denying his motion to set aside the verdict and judgment for defendant and to grant plaintiff a new trial herein and from the whole thereof.

Dated October 13, 1948.

PHILANDER BROOKS
BEADLE,
ERNEST E. EMMONS, JR.,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 16, 1948. [21]

CASH BOND

Know All Men By These Presents:

That we, Philander Brooks Beadle and Ernest E. Emmons, Jr., depositing the sum of \$250.00 with the Clerk of the United States District Court, Northern District of California, Southern Division, are held and firmly bound unto the Atchison, Topeka & Santa Fe Railroad, a corporation, in lieu of surety or sureties, in the full and just sum of said Two Hundred Fifty Dollars (\$250) to be paid to the said Atchison, Topeka & Santa Fe Railroad, a corporation, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 28th day of October in the year of our Lord One Thousand Nine Hundred and Forty-eight.

Whereas, lately at a District Court of the United States for the Northern District of California, in a suit pending in said Court, between George H. Graham, plaintiff, versus the Atchison, Topeka & Santa Fe Railroad, a corporation, defendant, and numbered therein 26368-G, a judgment was rendered against the said George H. Graham and the said George H. Graham having filed in said Court a notice of appeal to reverse the said judgment in the aforesaid suit, on appeal to the United States Court of Appeals for the Ninth Circuit, at a session of said Court of Appeals to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, that if the said George H. Graham shall prosecute his appeal [22] to effect, and satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award, if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Dated October 28, 1948.

PHILANDER BROOKS
BEADLE,
ERNEST E. EMMONS, JR.,

Acknowledged before me the day and year first above written.

(Seal) /s/ AURELIA WOODARD,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Oct. 28, 1948. [23]

[Title of District Court and Cause.]

DESIGNATION OF POINTS ON WHICH
APPELLANT WILL RELY ON APPEAL

On appeal to the United States Court of Appeals for the Ninth Circuit, the appellant herein will rely upon the following points:

I.

The uncontradicted evidence adduced at the trial establishes

(a) Defendant's liability as a matter of law, and

(b) That the release pleaded in defendant's answer is invalid as a matter of law. [24]

II.

The District Court erred in directing a verdict in favor of defendant.

III.

The District Court erred in holding that the release signed by plaintiff was, as a matter of law, a bar to this action. Even if appellant's point I, *supra*, were not well taken, the evidence at least presented the following questions of fact, which should properly have been submitted to the jury:

1. Whether the acts of the defendant in dealing with appellant constituted fraud;
2. Whether there was a mutual mistake of a material fact at the time of execution of the release;
3. The nature, extent, exacerbation and permanency of appellant's alleged injury;
4. Whether appellant knew or suspected the nature, extent, exacerbation or permanency of his alleged injury; and
5. Whether appellant had effectively rescinded the release.

IV.

The District Court erred in refusing to permit counsel for appellant on direct examination to put to appellant the question whether appellant "knew or suspected" that he had suffered a permanent spinal injury at the time he signed the release.

Dated: October 28, 1948.

PHILANDER BROOKS BEADLE,
ERNEST E. EMMONS, JR.,

Attorneys for Plaintiff and Appellant.

[Endorsed]: Filed Oct. 28, 1948. [25]

[Title of District Court and Cause.]

DESIGNATION OF PAPERS FOR RECORD
ON APPEAL

To the Clerk of the above Court:

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit, with reference to the Notice of Appeal filed herein, a transcript of the record to consist of the following:

1. Complaint.
2. Answer.
3. Verdict of Jury. [26]
4. Judgment on Directed Verdict.
5. Motion for New Trial.
6. Order Denying New Trial.
7. Demand for Jury Trial.
8. Substitution of Attorneys.
9. Notice of Appeal.
10. The Minutes of the Trial.
11. Transcript of Oral Testimony.
12. Designation of Papers for Record on Appeal.
13. Designation of Points on Which Appellant will Rely on Appeal.
14. Cash Bond on Appeal.

PHILANDER BROOKS BEADLE,
ERNEST E. EMMONS, JR.,
Attorneys for Plaintiff.

Dated: October 28, 1948.

[Endorsed]: Filed Oct. 28, 1948. [27]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing pages, numbered from 1 to . . , inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of George H. Graham, Plaintiff, vs. Atchison, Topeka and Santa Fe Railroad, a corporation, Defendant, No. 26368H, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$7.90 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 24th day of November, A.D. 1948.

(Seal) C. W. CALBREATH,
Clerk. [28]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

August 17, 18, and 19, 1948

Appearances: For the Plaintiff: Ernest E. Emmons, Esq. For the Defendant: George Smith, Esq., and Gus Baraty, Esq.

The Court: Well, we will proceed with the case. Will you call your witness, counsel?

Mr. Emmons: Yes. Mr. Graham, will you take the stand?

GEORGE H. GRAHAM,

Called on his own behalf, sworn.

Q. (The Clerk): Will you state your name to the Court and jury?

A. George H. Graham.

Mr. Emmons: I take it, counsel, that you will stipulate that the railroad was engaged in interstate commerce at the time of the accident?

Mr. Smith: Yes.

Mr. Emmons: And that the plaintiff was employed as a brakeman?

Mr. Smith: That's right.

Direct Examination

Q. (Mr. Emmons): Where do you reside, Mr. Graham? [2*]

A. Searchlight, Nevada.

Q. And what is your occupation?

A. Well, I am in the mining business a little bit, do a little mining.

Q. And are you a railroad man?

A. Yes, sir.

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

(Testimony of George H. Graham.)

Q. Were you ever employed by the Santa Fe Railroad? A. Yes, sir.

Q. And were you working as a railroader on July 5, 1945? A. Yes, sir.

Q. What time did you start work on that date?

A. The Santa Fe?

Q. With the Santa Fe. No, on that particular day, July 5, 1945. A. February 13, 1943.

Q. You misunderstood my question. What time in the morning did you start work on July 5, 1945?

A. Oh, eleven o'clock in the morning.

Q. At eleven o'clock in the morning. And where did you start work?

A. At Seligman, Arizona.

Q. And in what capacity did you work at that time? A. As a flagman.

Q. As a flagman. Were you on a freight train or a passenger train? [3] A. Freight train.

Q. How many cars, approximately, were in that freight train? A. Oh, about 70.

Q. 70 freight cars. And were you a flagman on the head end of the engine of the train, or the rear of the train? A. The rear.

Q. And where were you on the train?

A. On the rear end.

Q. Were you in the caboose?

A. In the caboose.

Q. And is that your normal position on the train?

A. That is the flagman's position.

Q. I see. And where were you en route, what was your destination?

(Testimony of George H. Graham.)

A. My destination was Needles, California.

Q. And they have a freight yard there?

A. How is that?

Q. They have a freight yard at Needles?

A. A freight yard; yes, sir.

Q. Now can you see this diagram here, Mr. Graham? Can you see this all right?

A. I can see it.

Q. Now you are familiar with the freight yard there at Needles, California, are you? Just answer my question, please. Are you familiar with the freight yard at Needles, California? [4]

A. Very familiar.

Q. Yes. Now this diagram is a very rough diagram, but am I right in putting on this diagram that this is the east end of the yard, the top of the diagram is south, and the right-hand side here is west and the north side is down here—is that correct?

A. That's right.

Q. Now down here on the north-east section, is this all river down here?

A. That is the Colorado River.

Q. The Colorado River? A. Yes, sir.

Q. Now these two lines up here, are they the main tracks, the main line for passenger——

A. Two main lines.

Q. Now the fartherest one to the south is the east main line, and where does that line go?

A. To Chicago.

Q. To Chicago. Now the west line is this second line, is that true?

A. That's right.

(Testimony of George H. Graham.)

Q. And that goes to Needles, does it?

A. Needles.

Q. And to Los Angeles?

A. Los Angeles. [5]

Q. Yes. Now these next lines I have indicated here as 16 and 17, do they go as indicated, and move into Track No. 20. extended? A. No. 20.

Q. Now, then, 18 and 19 do the same, is that true? A. That's right.

Q. Now on that particular date and at that time, do you recall whether or not there was a spur track down in this location? A. There was.

Q. And about how far from, say, this switch lock here down to that spur track, how far would you say that would be in car lengths?

A. Oh, I would say 15 cars, or maybe more.

Q. Now let me ask you this: On the particular morning in question, about what time did you arrive in the yard?

A. Oh, about one o'clock.

Q. About one o'clock. And where did you park, or where did the train stop with reference to the ice house?

A. The final stop was inside of Number 20 track there.

Q. On Number 20 track—this one that goes right along here? (Indicating.)

A. That's right.

Q. And where did the head of the train stop?

A. Well, it would be up there on the west end there, just in the clear of the lead there.

(Testimony of George H. Graham.)

Q. Right here, right about here? [6]

A. Right in there.

Q. Right in there. And where was the caboose at that time?

A. Right east of the ice house, about two or three car lengths.

Q. East of the ice house; that would be this direction? A. That's right.

Q. Would this little train in here that I marked be about right?

A. That is about right.

Q. That is a very rough diagram. It isn't made in scale; you understand that, don't you?

A. Yes.

Q. Then what would be the distance from the caboose to the spur track over here? (Indicating.)

A. Oh, I would say it would be seven or eight hundred feet.

Q. Would you say in car lengths, of the regular box cars? A. How is that?

Q. Could you put that seven or eight hundred feet into box car lengths? A. You could.

Q. About how many box cars would that be?

A. Well, 20 cars would be about eight hundred feet.

Q. I see. It would be about 40 feet a piece, would it? A. That's right.

Q. On the night or the morning of the accident, were there any cars in this spur track? [7]

A. There was.

Q. What do you call those cars?

(Testimony of George H. Graham.)

A. Well, outfit cars.

Q. Outfit cars; what are they?

A. Well, people are living in them that work on the track—extra gangs and such as that.

Q. I see. Now let me ask you this; on this line along here, is there a short curve going around there? A. That's right.

Q. There is a slight curve there, is there?

A. A slight curve.

Q. Now on the morning of July 6, 1945, when you arrived there and the train stopped, what were your duties as a flagman?

A. To stay on there until we pull into the yard.

Q. And did you display any markers or signals of any kind?

A. I had them on when I got there, but I took them down.

Q. What did you have on there at the time?

A. Well, red markers and yellow.

Q. Red and yellow markers? A. Yes.

Q. And did you take them down?

A. I took them down.

Q. Now is there a company rule in that yard, Mr.— A. There is.

Mr. Baraty: I object; the rule, your Honor, is the best [8] evidence.

Mr. Emmons: Do you have a copy of the rule books, counsel?

Mr. Baraty: Yes, we have.

Mr. Emmons: May I have it, please?

(Testimony of George H. Graham.)

Mr. Smith: I think you have a copy of it, Mr. Emmons.

(Conversation among counsel out of hearing of reporter.)

Mr. Emmons: Is it stipulated these are the Company Rules that were in force and effect at the time of the accident?

Mr. Baraty: Not all of them. The one you are going to read now, we will stipulate was a company rule enforced at the time of this accident. It is on page 39, I think.

Q. (Mr. Emmons): I will read this rule to you, Mr. Graham, and I will ask you if you are familiar with this rule, Rule 19-A of the Rules and Regulations of the Operating Department of the Santa Fe Railroad (Reading.):

“On arrival at terminals, markers or classification signals must not be removed until the train has been delivered to the yardmen or placed clear of the main track.”

Now, you are familiar with that rule, are you?

A. I am.

Q. And you knew about that rule at the time you entered the yard? A. I knew about it.

Q. And when you were on this track, when this train was on [9] this track, on Track 20, was it off the main track?

A. Way off, way in the clear.

Q. Let me ask you this question: What are the yard limits of the Needles Yard?

(Testimony of George H. Graham.)

A. Well, the yard limit is, any place where there is a yard, within the yard limits boards. There is yard limit boards stationed out on either side of the town.

Q. I see. A. Or the place.

Q. Now, is the yard limit on the east side, the direction from which you were coming, how far down this way or east of the ice house is that?

A. About a mile, a mile and a quarter, maybe further from the ice house.

Q. Is that where the lead comes in?

A. The lead comes in west of the yard limits board.

Q. Yes. Off the main track? A. Uh-huh.

Q. And the train being off the main track, you took down the markers, is that it?

A. That's right.

Q. Now, Mr. Graham, while you were there at about one o'clock in the morning, and you had taken down the markers, what else did you do at that period?

A. Well, I crawled up in the cupola to avoid the mosquitoes. [10] They were swarming all around there.

Q. Yes?

A. And I was sitting there waiting to pull on into the yard.

Q. I see. Now what yard do you mean by that?

A. The yard that was up west of there.

Q. You mean the additional part of the yard?

A. That's right.

Q. What is this, more freight yard up there?

(Testimony of George H. Graham.)

A. More freight yard up above there.

Q. And you sat here in the caboose, did you?
Is this a fairly rough idea of a caboose, this little rectangle here, showing the cupola on top?

A. That's right.

Q. Does that have observation windows in the side?
A. That is it.

Q. And those markers that you took down, would they be on the back of the cupola like that?
(Indicating.) A. The side of the car.

Q. On the side of the car?

A. The rear of the car.

Q. Up this way?
A. That's right.

Q. Like ears on it. Now that cupola—I mean, the caboose, does it have some kind of a barricade or bar across it to withstand shock, bumping around? [11]

A. Well, that is, it has a drawbar and a platform.

Q. A drawbar and a platform?

A. With a railing there and with a ladder that goes up to the top, up on top.

Q. I see. Is that to take up the shock of——

Mr. Baraty: We object to that as leading and suggestive, if your Honor please; he can tell us what it is.

Q. (Mr. Emmons): What is the purpose of this drawbar?

A. Well, it is a safety precaution, and a place to stand on, and you have your steps on either side, with the grabirons.

(Testimony of George H. Graham.)

Q. All right.

A. That is what is called a platform caboose.

Q. I see. Now at this time, when you were in the caboose, could you see any approaching traffic on line 20?

A. I saw a headlight coming behind me.

Q. And where were you when you saw the headlight?

A. On the right side of the caboose ahead of the cupola.

Q. On this side? A. That's right.

Q. That would be on this side going——?

A. Going west.

Q. All right. Now were you looking backwards?

A. I saw the reflection in the window—drew my attention first.

Q. I see. [12]

A. And I turned around and looked back.

Q. Now when you were looking back, how far behind you did you see the headlights? Approximately how many car lengths?

A. Oh, quite a ways; the reflection, I could see it.

Q. Well, could you tell us in distance, with relation to this spur track down here?

A. Oh, I would say maybe six, seven, eight hundred feet or a thousand feet.

Q. Way down the track?

A. Way down there.

Q. What did you do after you saw that?

A. I kept watching it.

(Testimony of George H. Graham.)

Q. You kept watching that approaching train, and then what did you do?

A. Well, I saw him coming around those outfit cars, and I watched him again, and I saw he was coming around and I thought he was coming a little bit fast, so I put my body out the cupola window and put my lamp out to slow him down, and he kept right on coming.

Q. I see. You signaled him out of the cupola window, this window here, is that right?

A. Yes, that's right.

Q. Now did you get any response to your signal?

A. None.

Q. Did he continue to come? [13]

A. Continued to come on.

Q. I see. What did you do next, then?

A. Well, I got down and went back on the platform and put my lamp, to slow him down again. Then I reached for a fussee, and he was too close for me, and I didn't have time to act, then I went back in the caboose and made a jump to the cupola to get up there in the event of a collision, so that I would have a chance to get out of the cupola window.

Q. I see. Now am I correct now, on this side of the river, pointing to the north, which is the bottom of the diagram—that is all river, that is the Colorado River? A. That is all water.

Q. Now directly to the north or the south, rather, on the other side of Track 20, what was in there, if anything?

(Testimony of George H. Graham.)

A. Well, it was strewed all along there with ties stacked in there.

Q. Ties were stacked in there? A. Yes.

Q. Could you have jumped on that side?

A. No, can't jump on that.

Q. So when you found that you were in the position of having to jump down the river or on these ties next to the cupola and the approaching train, you decided to go back into the caboose and you went up into the cupola, is that right?

A. That's right. [14]

Q. Now did you get up into the cupola?

A. I didn't quite reach it.

Q. How far up did you get?

A. I was on the step and across, and when they hit——

Q. Did you have a hold of anything when you were up there?

A. Well, I had ahold of a grabiron there; there is a long iron that goes across both sides.

Q. And what happened while you had ahold of that grabiron?

A. Well, it just pitched me up into the air and down on the floor.

Q. Is there an opening up in here, similar to that? (Indicating.)

A. Well, there is two rear windows there.

Q. Well I mean, is there an opening to get up into the cupola?

A. Well, there is a space about that wide, (indicating) and a ladder about that **high from the**

(Testimony of George H. Graham.)

floor. (Indicating.)

Q. About what would be the distance from the floor of the caboose up to the top?

A. To the roof or to the platform? To the platform, oh, I would say five feet, maybe six feet.

Q. I see. And was there any impact, did this engine come and hit the caboose.

A. Terrible impact.

Q. I see. And as a result of that impact, you fell down?

Mr. Baraty: Let him say it; your Honor, I don't think he should be led. [15]

Q. (Mr. Emmons): Well, is that true?

Mr. Baraty: That is objected to; it is leading and suggestive.

Q. (Mr. Emmons): Well, what happened when the impact was there, Mr. Graham?

The Court: Well, he has already answered. He said that he fell down.

Mr. Emmons: Yes, I think so.

Q. (Mr. Emmons): Did you fall directly to the floor of the caboose?

A. I fell on the floor.

Q. And what portion of your body struck the floor?

A. Well, on my back, and my hip and my head and shoulders—left shoulder.

Q. Now were you able to get up at that time?

A. I tried to get up, was getting up on my feet when the other crash took place.

Q. Now do you know what caused the other crash?

(Testimony of George H. Graham.)

A. Yes, the engineer became excited and reversed his engine and jerked back away from the caboose, and dropped the caboose right onto the rails.

Q. I see. Now were you able to get out—wait, strike that. After this second impact and the caboose dropped to the ground, did anything happen to you?

A. Oh, I don't know; it was dark in there and things were [16] falling around, and I just couldn't say what did happen in there.

Q. Well, were you thrown to the floor or did anything else happen to you at that time?

Mr. Baraty: Now, your Honor, I will object to the leading questions. The witness is testifying that he doesn't know. I will object to a leading question on the subject now before the Court.

Q. (Mr. Emmons): Well, you tell us what happened at the time of the second impact, Mr. Graham.

A. Well, I managed to get out of the caboose after the second crash.

The Court: No, he wants to know what happened to you at the time of the second crash.

Q. (Mr. Emmons): At the time of the second crash?

A. Well, I went down again on the floor and I probably slid through the car door; I don't know, because the caboose was standing on an angle like that. (Indicating.)

Q. I see. Well, am I correct in saying that this is your testimony, that after the first—

(Testimony of George H. Graham.)

Mr. Baraty: Your Honor, I will object to this, the form of this question. It is his testimony, it has already been asked and answered.

The Court: Yes.

Mr. Baraty: If it isn't, the question is leading and [17] suggestive. I object to it on that ground.

The Court: Yes. Why don't you ask him, counsel, what the position of the caboose was at the time of the collision, and then whether it changed its position or not, and then maybe you can get these facts in the record.

Mr. Emmons: Very well.

Q. (Mr. Emmons): What was the position of the caboose at the time of the first impact?

A. It was on an angle, about like that. (Indicating.)

Q. And at the time of the first impact?

A. That's right, it was right up through a car of bananas ahead, just sliced right on through it.

Q. All right. Now at the time of the second impact, what happened? What was the position of the car, rather?

A. Well, it went right down to the rails, and of course that increased the incline to about forty-five degrees, maybe a little more. (Indicating.)

Q. I see. And what happened to you when this increased its incline?

A. Well, I just got up again some way and slid out the door. I couldn't walk, because the incline was too great. And I got out on the platform and got down on the ground some way.

Q. Let me ask you this: Will you describe what

(Testimony of George H. Graham.)

the contents of the caboose are, or might be? That is, in relation to furniture and utensils, or whatever may be in there. [18]

A. You mean the contents and all?

Q. Yes, all around. What is on the inside of the caboose?

A. Oh, oil cans, a stove, spare knuckles, pins.

Q. Will you explain what a knuckle and a pin is? A. Well——

The Court: Well, counsel, I understood your opponent to say that there isn't very much dispute about the facts as to the collision, the fact that this collision took place.

Mr. Emmons: Well, the injury, though, is in dispute, your Honor.

The Court: Well, I think that if you describe all the contents of the car, that is going to take a long time, unless it has something to do with the injury.

Mr. Emmons: I think it has, if we may go into it.

The Court: Why don't you ask him what was the nature of the injuries he suffered, where he had pain, where he hit himself, how he was thrown, and have him describe all that?

Q. (Mr. Emmons): Well now, Mr. Graham, at the time this happened, were you injured?

A. At the time it happened?

Q. Yes. A. No, no, I was——

Q. Well, as a result of this accident, were you injured?

A. After the collision, I was all knocked to pieces.

(Testimony of George H. Graham.)

Q. You were? And what was the type injury that you suffered? [19]

A. Well, I couldn't say. I was dazed and severe pain in my hip and my left shoulder and head—a big cut over my eye and other scratches. And from falling glass.

Q. You stated you got out of the caboose, and what did you do next after you got out of the caboose?

A. Well, I couldn't tell you off-hand, because I was in a dazed condition, and I got out there and somebody got ahold of me, and the engineer was down on the ground looking over the thing and yelling his head off.

Q. I see.

A. Things were rather excitable around there at that time.

Q. I see. Now after this accident, what way did you go? That is, immediately after the accident?

A. Well, I believe I walked down the track. It has never been clear in my mind whether I did or not, but I think I cut those cars off.

Q. The last two cars?

A. The last two cars and the caboose; that would be three cars.

Q. I see. Why did you do that?

A. Well, I saw they were on the ground. I could see that much in spite of all the blood that was spurting around there. I know that if they started up, they would drag that track all to pieces and

(Testimony of George H. Graham.)

probably cause ten or fifteen, twenty thousand dollars worth of damage.

Q. And that night or morning, where did you go immediately [20] after this?

A. Well, I made it over to the main line, the west-bound main line, right in that curve there.

Q. Yes?

A. And there was a passenger train went by, then another one, and one of them stopped right there and the vestibule doors right in front of me were open, and I crawled in there and rode up to the station.

Q. I see. And when you got to this station, what happened?

A. Well, I got off, and of course everybody crowded around me and wanted to know what happened and this and that, and I told them. A fellow by the name of Beadle got ahold of me and tried to take me to the hospital, and I just didn't want to go there to the hospital.

Q. Where did you go? A. I went home.

Q. How did you get home?

A. Well, some railroad man picked me up in his car, took me over.

Q. Where is your home?

A. At that time it was in Needles. I had a little cottage there.

Q. Yes, and where did you go after that?

A. Well, I washed up a little bit and then I decided I would go home to Searchlight. [21]

Q. You have a home in Searchlight; that is in Nevada, is it?

(Testimony of George H. Graham.)

A. Well, I live up there.

Q. And how long did you stay at Searchlight?

A. Oh, three days, about.

Q. And were you up and about, or were you in bed?

A. No, I was down.

Q. Were you in bed? A. Yes.

Q. And who took care of you?

A. How is that?

Q. Who took care of you there?

A. My wife.

Q. And where did you go subsequent to that? Did you go anywhere else?

A. Well, I went to Boulder City on the 9th.

Q. And who did you go to see?

A. Dr. Fenlon.

Q. F-e-n-l-o-n? A. F-e-n-l-o-n.

Q. How did you get to Boulder City?

A. Drove up.

Q. Did you drive or did your wife drive?

A. No, my wife drove the car.

Q. About how far is it to Boulder City?

A. About 40 miles. [22]

Q. And there did you see Dr. Fenlon?

A. I did.

Q. Did he take any X-rays at that time?

A. No.

Q. What did he tell you to do?

A. Well, he just looked me over and ordered me to bed.

Q. To bed. And then did you return home?

A. I went on home.

(Testimony of George H. Graham.)

Q. How long were you at home?

A. Oh, I was probably two or three weeks. I can't tell off-hand—that is so far back.

Q. I see. Now did you attend an investigation by the company at Needles? A. I did.

Q. Did you make a report of the accident?

A. Well, they held an investigation to find out the guilty parties and the ones at fault. I did go in there on the 16th.

Q. It was on the 16th, was it?

A. Yes, that's right.

Q. And did you see a doctor while you were there?

A. I can't say whether I saw a Dr. Price along that time; I think that day or the next day or the day after—it was along that time.

Q. What did Dr. Price do for you, if anything?

A. Nothing, just look me over and said, "Well, you have got [23] some bad bruises and contusions."

Q. Did he give you any medicine?

A. None. Oh, some pills to kind of relieve the pain a little bit.

Q. Did you go back to Searchlight?

A. I went back to Searchlight.

Q. On July the 17th or 18th?

A. Along in there.

Q. When did you next go to Needles to seek medical attention?

A. Oh, that would be along in early August, maybe.

Q. Who did you see then? A. Dr. Holtz.

(Testimony of George H. Graham.)

Q. And did you talk to him about your condition?
A. Oh, yes.

Q. What did he tell you to do?

A. Well, he ordered me into the hospital.

Q. Into what hospital?

A. The Santa Fe Hospital in Los Angeles.

Q. And were you suffering any pain at that time?
A. Quite a bit.

Q. Did you inform him as to those pains?

A. How's that?

Q. Did you tell the doctor what pains you had?

A. Oh, yes.

Q. What pains were you suffering at that time? [24]

A. Well, mostly in my hip and back and my left shoulder was giving me bad trouble, and the back of my head.

Q. I see. Did you finally go to the hospital at Los Angeles?

A. I went in on the 10th of August.

Q. That is, the Santa Fe Hospital in Los Angeles?
A. Yes.

Q. And did you gain admission when you first went down there?
A. No, I didn't.

Q. When did you get into the hospital?

A. On the 14th.

Q. On the 14th?
A. Yes.

Q. What took place between the 10th and the 14th?

A. Well, they just didn't happen to have room out there, they told me to go on back down and

(Testimony of George H. Graham.)

get a room, and then they would have a cot in a day or two, or two or three days.

Q. I see. How did you get back and forth to the hospital? A. Yellow Cab.

Q. Yellow Cab Company — Yellow cabs each day? A. Both ways.

Q. You were admitted to the hospital on August 14th? A. On the 14th.

Q. That was in 1945? A. Yes.

Q. Did they take any X-rays while you were in this hospital? [25]

A. They did a few days after my admission.

Q. I see. Now did they give you any treatment while you were there?

A. Well, heat treatments, little lamps.

Q. And massage?

A. And that is about all.

Q. I see. A. Some pills.

Q. When did you leave the hospital?

A. On the 24th.

Q. Did you leave voluntarily? A. I did.

Q. Where did you go then?

A. How was that?

Q. Where did you go after that?

A. Well, I went back to town, then come on home.

Q. Back to Searchlight?

A. Searchlight, Needles and then Searchlight.

Q. Did you subsequently go back to see Dr. Fenlon?

A. I went back up to see him.

(Testimony of George H. Graham.)

Q. Do you remember about when that was?

A. Well no, it was right after I returned. And then I saw him, he saw me at various times in Searchlight.

Q. Did you ever have an occasion to talk to Dr. Morrison, the chief surgeon of the hospital there at Los Angeles? [26]

A. Yes, sir.

Q. On what date was that?

A. Well, that was on the 19th.

Q. On the 19th of what?

A. Of August, or September.

Q. Of 1945?

A. Yes, sir.

Q. And did you discuss your condition with Dr. Morrison at that time?

A. Yes, I talked to him.

Q. And what did he tell you?

A. Well, he told me to go back to work if I possibly could, that the company was very short of men and that they needed to keep the trains operating—the war was still on, and to go back and take it easy, that I would be all right in thirty or sixty days. So he gave me a release and I went back, but I didn't go to work right at that time.

Q. Dr. Morrison told you that you would be all right within thirty to sixty days?

A. Thirty to sixty days, to take it easy.

Q. Did he tell you to go back to work at the same type of work that you had been doing before?

A. No, he didn't.

Q. What did he tell you?

A. Told me to take a passenger job, take it easy. [27]

(Testimony of George H. Graham.)

Q. Now I will show you——

(Document handed to Mr. Baraty by Mr. Emmons.)

Q. (Mr. Emmons): I show you here, Mr. Graham, a document headed "Discharge from treatment, the Santa Fe Hospital Association," dated 9/18/45. (Handing to witness.) I will ask you if Dr. Morrison or one of his employees at that time gave you that discharge.

A. He gave me this certificate? He didn't, but it was under his direction.

Q. While you were in his office, did someone, did he indicate somebody to make this out for you?

A. One of the clerks or one of the nurses or internes in the office.

Mr. Emmons: I will offer in evidence at this time this discharge from treatment dated 9/18/45, if the defendant has no objection.

Mr. Baraty: The defendant has no objection.

The Clerk: Plaintiff's Number 1.

(Discharge dated 9/18/45 referred to above was received in evidence as Plaintiff's Exhibit No. 1.)

Q. (Mr. Emmons): Now at the time that you talked to Dr. Morrison, was there any question regarding broken bones? A. No, none at all.

Q. Did he tell you that there were no broken bones?

A. Told me—he didn't say there was no broken bones, he just [28] said, "Go back and take it easy, you will be all right, you can get along."

(Testimony of George H. Graham.)

Q. Did you ever see the X-rays?

A. No.

Q. That the Santa Fe Railroad took?

A. No, they wouldn't show them to me.

Q. Did you know at that time that you had a fractured vertebra? A. No, I didn't.

Mr. Baraty: Well, your Honor, that is assuming something not in evidence; it is also leading and suggestive. I object to it on that ground. I ask that the answer be stricken out and that we have an opportunity to have our objection considered.

The Court: The answer may go out.

Mr. Emmons: I think the case is right directly in point, that that is one of the facts in issue, and that the——

The Court: Well, I think you are entitled to show that, but you have to first lay some foundation. You can ask him at this time if he knew whether he had any other injuries except what he had discussed with the doctor. You must establish his knowledge at the time. Then you can develop the other points later on.

Q. (Mr. Emmons): Mr. Graham, did you have any knowledge of any other injuries, other than those which you discussed with the doctor? [29]

A. No.

Q. And what injuries were discussed with the doctor?

A. Well, I told him my hip was hurting me, and my back, through the small of my back, and my shoulder. He felt me over. Well, he says, "You'll be all right; take it easy." He said, "Get back on

(Testimony of George H. Graham.)

the job." He repeated that several times, to get back on the job, that we needed every man we could get, the war was still on.

Q. Now after your conversation with Dr. Morrison, did you return to Needles or Searchlight?

A. I returned to Needles.

Q. And what did you do at Needles?

A. Well, I stayed there a day or two, maybe. I don't know how many days. Then I went back home to Searchlight, and I came back down to Needles and they wouldn't let me go to work without first getting a release.

Q. What kind of a release?

A. Well, a release to go back to work there. They wouldn't put me on the board or let me bid on a job of any kind until I had got a release.

Q. And what was your understanding in regard to the necessity for getting a release?

A. Well, that you could make some adjustment with the company.

Mr. Baraty: I will object to the question; I don't know what counsel means by "release" and I think it is immaterial, [30] what his understanding was.

The Court: Yes, that calls for—I will sustain that.

Q. (Mr. Emmons): Now, Mr. Graham, are you familiar with Rule 304 of the Company Rules?

A. I have read it, yes.

Mr. Baraty: I want to say this, your Honor, that Rule 304 was not in existence at the time of

(Testimony of George H. Graham.)

this accident. It is in the book, but it was not in existence; the book was published in 1926 or '27.

Mr. Emmons: If your Honor please, this is not the correct procedure to get evidence before the jury, and I think the proper way, if there is such evidence, is to bring it in on the defendant's case.

Mr. Baraty: Well, the objection is that there is no foundation laid.

The Court: Yes, why don't you ask the witness what the facts are? Never mind that rule. Have him tell his story and then you can lead up to the other matters, if you want.

Q. (Mr. Emmons): Well, at a time prior to this release, did you have a conversation with anybody in regard to settling this case with the railroad?

A. Well, I went into the trainmaster's office.

Q. And what were you told there?

A. And I was told that I would have to get a release from the claim agent. [31]

Mr. Baraty: I think we should have some foundation—date, persons present, and so on.

The Court: Yes, you will have to state when this conversation took place, where and who was present.

Q. (Mr. Emmons): Mr. Graham, on what date did you go to the trainmaster's office?

A. Well, I would say around the 25th or 26th of September.

Q. All right, and who did you talk to in there?

A. Some clerk in there that—I don't know his

(Testimony of George H. Graham.)

name. They change so many around there. Some woman in there at that time that told me says, "Well, you can't go to work. Have you got a release from the claim agent?" I said, "No, I have one from the doctor." She said, "No, you will have to get one from the agent before you can go to work."

Q. In other words, you went there with the purpose of going back to work, is that right?

A. That's right.

Q. And they told you before you could go back to work, you had to have a release executed with the railroad company?

A. That's right.

Q. Before you could go back to work?

A. That's right.

Q. That a release would have to be secured as to your injuries which you suffered in this accident, is that right?

Mr. Baraty: What was the question? I didn't hear it. [32] May I have the question read, Mr. Reporter?

(Record read.)

Mr. Baraty: Well, I think that is leading and suggestive, your Honor. Also, it is repetitious.

The Court: Well, it can't be both, but it is leading and suggestive.

Q. (Mr. Emmons): Well, what kind of a release did they ask you for?

Mr. Baraty: Now, your Honor, I think there is no foundation laid for this. The witness says that some person made a statement, and for that to be

(Testimony of George H. Graham.)

binding on the company, the person who made it should be identified first.

The Court: Well, that is true.

Q. (Mr. Emmons): Who was it that you talked to there?

A. Well, there was some man in there, and then a woman.

Q. Well, do you know what his position in the company was? A. How's that?

Q. What was his job, what was his position?

A. Clerk in the trainmaster's office.

Q. I see. Were both these people clerks in the trainmaster's office? A. (No response.)

Q. Now you are a railroad man, are you not?

A. That's right.

Q. And you have been a railroad man for a number of years. [33] Are you familiar with the custom of roadmen in regard to this situation?

A. I am.

Mr. Baraty: What situation? All right.

Q. (Mr. Emmons): Now what has been the custom and the rule in the railroad business in that regard?

Mr. Baraty: We will object to any matter of custom or practice in regard to the situation; I assume counsel is talking about a release. Unless there is something here to do with the Santa Fe Railroad, what may be the custom elsewhere is not material to the point at issue here.

Mr. Emmons: All right, we will limit it to the Santa Fe Railroad.

(Testimony of George H. Graham.)

Q. (Mr. Emmons): What is it?

A. Well, I have seen other men down there that was in the same position as myself, that were not permitted to work until they made some adjustments.

Q. Did they execute a release?

A. They had to execute a release before they went to work.

Mr. Baraty: I will ask that that answer be stricken out as not establishing a custom. I think the Court well knows that that is not the rule.

The Court: Well, that last answer may go out. What he saw other men doing would be hearsay, too. The circumstances might not be the same. [34]

Q. (The Court): Is the trainmaster's office the place where you go to resume your work?

A. That's right, Judge.

Q. And that is where they give you your orders to report for duty? A. Yes, sir.

Q. Did you go there to go back to work? Is that what you went back for?

A. You have to go——

Q. Speak up a little louder, please.

A. The trainmaster's office is under the superintendent, and he handles all the conductors and trainmen and yardmen.

Q. And you went to the trainmaster's office to go back to work and somebody in the office told you you had to get a release?

A. That's right.

The Court: All right, you ask him, "What did you do next?"

(Testimony of George H. Graham.)

Mr. Emmons: What did you do then?

A. I went back to Los Angeles, or I went to see a claim agent by the name of Mr. Lewis, and he offered to make a settlement, but I had to go into Los Angeles and settle in Los Angeles.

Q. Let me ask you this: Did anyone ever approach you prior to the time that you talked to Mr. Lewis in regard to settling this case?

A. Yes.

Q. And where? [35]

A. In the Santa Fe Building in Los Angeles.

Q. And was that the hospital?

A. No, that was the Santa Fe Building on 6th and Main in Los Angeles.

Q. And who was that? A. Mr. Simms.

Q. Mr. Simms. And when was that?

A. Oh, that would be along, the 24th of August.

Q. Is that right after you got out of the hospital? A. (No response.)

Q. And what did he say in regard to this settlement?

A. Well, he wanted to settle with me, and I didn't consider it sufficient and didn't accept it.

Q. I see. So then what did you do?

A. I went back to Needles.

Q. And you went back to Needles. Now subsequently, you went to the trainmaster's office to go to work, is that it, and attempted to go to work?

A. I did, in the latter part of September.

Q. And then you saw this fellow, Mr. Lewis?

A. That's right.

Q. You had a conversation with him?

(Testimony of George H. Graham.)

A. I did.

Q. And where was that?

A. In Needles. [36]

Q. In Needles, and where in Needles?

A. In the claim department, claim agent's office.

Q. And what was the subject of the conversation?

A. Well, I just told them I would like to settle and go to work, and he made me an offer, but I had to go to Los Angeles. I think they wanted to settle with me themselves, so I went in to Los Angeles.

Q. Subsequent to the time you talked to Mr. Lewis?

A. After I talked to Mr. Lewis.

Q. Then you went into Los Angeles?

A. I went in to Los Angeles.

Q. And who did you see in Los Angeles?

A. Mr. Hitchcock.

Q. Mr. Hitchcock. And where was this?

A. Up in the Santa Fe Building in Los Angeles.

Q. In the claims department?

A. In the claims department.

Q. About what date was that?

A. That was about the 31st, around the first of October or the 30th of September.

Q. Was that the date the release was signed?

A. That's right.

Q. Did you enter into an agreement with them at that time? A. Did I what?

Q. Enter into an agreement with him at that time. [37]

(Testimony of George H. Graham.)

A. Well, he told me a thousand dollars, it was there—take it or leave it.

Q. I see.

A. So I thought, “Well, do the best I can.”

Q. And did you discuss the property damage that you suffered?

A. Well, I told him I had broke two pairs of glasses in the crash, and he paid me for them.

Q. \$50.00? A. \$50.00.

Q. Is that the total? Does that explain the \$1050? A. Yes, sir.

Q. Now with regard to this release, did you know at the time that you signed this release that you were suffering from any other injuries, other than the ones you knew about at the time you discussed this with Dr. Morrison? A. No.

Mr. Baraty: We will object to that.

A. (Continuing): I didn't know—

Mr. Baraty (Continuing): I don't think there is a proper foundation laid, and it is leading and suggestive. I haven't the least conception what somebody else may know about something. We don't know what this man has in mind when he says that. The question is what he knew about it.

The Court: Well, why don't you go ahead first, counsel, and find out if at some other time he had some other examination [38] where something was found the matter with him, and then go back. Let's try to move along.

Mr. Emmons: All right.

(Testimony of George H. Graham.)

Q. (Mr. Emmons): Did you subsequently go to work, go back to work? A. Did I what?

Q. Did you subsequently go back to work?

A. I went right back to work. I don't remember when I made the first trip.

Q. You mean right after you signed the release? A. Yes.

Mr. Baraty: That is leading and suggestive, your Honor, and I will show you after while why I think I am right. It is leading and suggestive. The question is, "—went right back to work after he signed the release."

The Court: Well, ask him the time and the date.

Q. (Mr. Emmons): When did you go back to work?

A. Well, I don't know; I think it would be maybe the first or second of October.

Q. Is that your best recollection on the subject?

A. It was right after I signed the release.

Q. (The Court): When you say, "right after" you mean the same day or a day or two afterwards?

A. A day or two after I signed the release.

The Court: A day or two after you signed the release. [39] All right; go ahead.

Q. (Mr. Emmons): Now, were you subsequently examined by Dr. Fenlon?

A. Dr. Fenlon saw me several times.

Q. I see. Were you able to continue work after that? A. Yes.

(Testimony of George H. Graham.)

Q. From then on?

A. No, I worked for about forty-five days.

Q. You worked about forty-five days; what was your condition during those forty-five days?

A. Bad.

Q. Well, will you explain what you mean by "bad"?

A. Well, I just couldn't get on and off good, and I couldn't do any—well, any active work, you know, like around a train, where you have got to be able to get on or off, sometimes at pretty high speed. And throwing switches, that was out of the question.

Q. (The Court): Well, he wants to know what it was that bothered you.

A. Well, it was right in the small of my back; that is where it gave me the trouble. And then stepping, my hip would catch on me.

Q. (Mr. Emmons): Now did you subsequently go to see Dr. Fenlon and have some X-rays made?

A. I went to Dr. Fenlon on the 13th of February, 1946. [40]

Q. And did he take X-rays at that time?

A. He did.

Q. And what did he tell you about that?

A. Told me——

Mr. Baraty: We will object to that as calling for hearsay testimony, and there is no basis or foundation for it. The defendant is not connected with the railroad company, or I mean the hospital.

The Court: Are you going to have any doctors testify?

(Testimony of George H. Graham.)

Mr. Emmons: Well, your Honor, we have the X-rays.

The Court: You have the X-rays?

Mr. Emmons: Yes, your Honor.

The Court: Are you going to have someone testify as to the X-rays?

Mr. Emmons: Yes.

The Court: I see.

Mr. Baraty: The question is, what did this doctor say to him? The doctor who signed it is not going to be present here, and that is hearsay evidence, not connected with the defendant corporation or the hospital association in any form.

The Court: Yes, that is true.

Mr. Baraty: It is Mr. Graham's own personal doctor.

The Court: Well, are you offering this in proof of an injury, or is this in connection with the knowledge of the plaintiff? [41]

Mr. Emmons: The knowledge of the plaintiff.

Mr. Baraty: No, it can't be that, because the testimony is directed to the 13th of February, 1946, and this release was on the first of October, 1945. Now they obtained this later on, and it is still subject to the point that it is calling for hearsay testimony. Dr. Fenlon should be here like anybody else has to come in here.

Mr. Emmons: That isn't true; it is merely a question pointed toward the knowledge of this plaintiff as to when he acquired knowledge of an

(Testimony of George H. Graham.)

injury other and different from the one he discussed with Dr. Morrison prior to signing the release. [42]

Q. (By Mr. Emmons): Mr. Graham, were you subsequently informed by another doctor that there was an injury to your spine?

A. Only Dr. Fenton.

Mr. Baraty: Now that is leading and suggestive, your Honor—the time and place and persons present.

Mr. Emmons: All right.

Mr. Baraty: And besides, it calls for hearsay testimony. Now we can't tell whether this is the same doctor or another doctor.

Q. (By Mr. Emmons): On February 13, 1946—

Mr. Baraty: May we have a ruling, your Honor?

The Court: Well, he is asking the question. There is no sense of my ruling on it.

Mr. Baraty: Pardon me, your Honor.

Q. (By Mr. Emmons): Mr. Graham, you had X-rays taken by Dr. Fenlon at Boulder City, did you? A. That's right.

Q. And were you informed at that time that you had an injury to your back?

A. He told me there. [44]

Mr. Baraty: Now we object to that as hearsay testimony.

The Court: For the limited purpose I have already stated, it may be allowed.

Q. (By Mr. Emmons): Now, Mr. Graham, was that the first time that you had known about this

(Testimony of George H. Graham.)

Q. And did you know about this injury at the time that you signed the release that you signed on October 1, 1945? A. No, I didn't.

Q. Now you say you worked for about forty-five days after the accident here in question. Now what was the last date that you worked, if you can recall?

A. Oh, 22nd, 23rd, 24th—maybe the 24th or 25th of November.

Q. Of what year? A. Of 1945.

Q. And did you ever return to work again?

A. Not until January 16, 1946.

Q. And how long did you work that time?

A. Just two round trips—four days.

Q. About four days. And then what occurred?

A. Oh, I got into a jam with the company officials down there. They framed me up on a false charge.

Mr. Baraty: Now, your Honor——

Mr. Emmons: I will stipulate that may go out.

The Court: Yes, that may go out. [45]

Q. (By Mr. Emmons): Just say what happened.

A. Well, I was under the influence of sulpha drugs, and I was pretty sick, and they pulled me off the trip as being intoxicated in Los Angeles, and—which I wasn't——

Q. Now what was the conclusion of that? What happened as a result of that?

A. Well, they just pulled me off the train and wouldn't let me go out.

The Court: Well, you want to know whether he was discharged?

(Testimony of George H. Graham.)

Mr. Emmons: Yes.

Q. (By the Court): Were you then discharged?

A. I was discharged. Well, I will take that back; there was an investigation held on the 24th of January, and it was closed out the 16th of February and I was discharged for violation of a rule, which I wasn't guilty of.

Q. (By Mr. Emmons): Were you ever exonerated from that?

A. No, they found me guilty.

Q. I see. Now have you been able to work since that time?

A. No, I haven't.

Q. Have you attempted to work?

A. Well, I went to Las Vegas one time and thought I would go to work, but I wasn't successful. I couldn't stand it there a full eight hours. I just give it up.

Q. Did you do any work around your house?

A. No, not much.

Q. How do you get along?

A. Well, I had a little mine.

Q. I see. And during the time that you worked for the Santa Fe Railroad, how much did you make a month?

A. Well, that averaged, more or less—sometimes \$350, sometimes \$400, or \$450.

Q. As high as \$450?

A. And more than that.

Mr. Baraty: Now, your Honor, I think—I would like to tell counsel that we can——

(Testimony of George H. Graham.)

The Court: Well, yes, let's save time. Can't you use the record on that?

Mr. Emmons: They won't give them to me, so I couldn't stipulate to that. I don't know myself what the man made.

Mr. Baraty: Mr. Emmons, you never asked us for the paysheet records of this man. You have got everything else you asked for.

Mr. Smith: Here they are.

The Court: Have you the pay sheet record? Show them to counsel and see whether you can't agree on them so that we can save some time. In the meantime, we will take the afternoon recess. Ladies and gentlemen, please bear in mind the admonition of the Court.

(Short recess.) [47]

Mr. Emmons: Looking over this record from the Santa Fe Railroad, I notice that the highest monthly pay during any month is \$424.73, your Honor. So, with that in mind——

Q. (By Mr. Emmons): Mr. Graham, would you consider that to be the highest monthly pay that you received during that time?

A. No, I have made far more than that.

Q. You feel that you have?

A. There were days we doubled and run up to \$450, \$500, \$550.

Q. Well, would that be your earnings during that period?

A. That's right, per month. I don't say that I done that in 1945, but while I was in freight service, I have went way over that.

(Testimony of George H. Graham.)

Mr. Baraty: Well, we are only concerned——

Mr. Emmons: Just a moment, counsel.

Mr. Baraty: Well, we are only concerned with 1945, when he was working for this company.

Q. (By Mr. Emmons): Just during the period, Mr. Graham, of the time that you worked for the Santa Fe Railroad Company, not in your prior experiences as a railroad man. Just during the period that you worked—you started in 1943, didn't you?

A. Forty-three.

Q. Well, what was the highest you ever made per month for the Santa Fe Railroad?

A. Well, down there at Blythe, I probably made \$550, close to \$600. [48]

Q. That is for one month's earnings?

A. That was on that local there, and that was sixteen hours a day and overtime.

Q. That was during the war?

A. During the war.

Q. Now these figures, you have had an opportunity to look at this, have you? Do they represent the figures for those months in 1945?

A. Well, I couldn't accept those figures.

Q. You don't think they are correct?

A. No, I don't think they are correct.

Mr. Emmons: Well, we will be unable to stipulate to these.

Mr. Baraty: We will have to bring in the pay officer.

(Testimony of George H. Graham.)

Q. (By Mr. Emmons): What would be your best recollection, Mr. Graham, as to the amount that you made——

Mr. Baraty: Now, if we are going to have that, we ought to have written documentary evidence. Otherwise, it is calling for hearsay testimony. These pay sheets are the best evidence of the man's pay; he wouldn't accept our evidence. Now we will have to insist that he produce his written evidence, documentary evidence.

The Court: Well, if he has any, you can ask him.

Q. (By Mr. Emmons): Do you have any receipts or anything representing pay received from the Santa Fe Railroad?

A. No, that was all burnt up in a fire in January, 1945, in [49] Needles.

Q. I see. Well then, what is your best recollection then as to the amount that you earned?

Mr. Baraty: Well, your Honor——

Q. (Continuing): ——per month?

Mr. Baraty: I don't think we are entitled to go back before January of 1945. This accident happened in July of 1945, and I think it is customary to take the current year, if we have it here.

The Court: Well, I don't think—if it is a question of fact in each year, what is a reasonable period. This is only for the purpose in the event the plaintiff is entitled to recover, of going to the element of damages.

Mr. Emmons: That is true.

The Court: I think that a year, or earnings for a year prior to an accident is certainly not an

(Testimony of George H. Graham.)

unreasonable period. The witness can state what his recollection is if he has no records, and if you have records to show to the contrary, why, you can produce them.

Mr. Emmons: That is my understanding. The plaintiff is entitled to present whatever evidence he can on the subject.

Q. (By Mr. Emmons): What is your best recollection as to the amount of money you earned per month for a year prior to July 5, 1945, while working for the Santa Fe Railroad?

A. Well, I was on the west end at that time, and—— [50]

The Court: Well, just give us the figures.

A. (Continuing): I would say it would run four, four and a quarter.

Q. Four to four and a quarter?

A. Four fifty, yes, after deductions.

Q. After deductions?

A. That is, the deductions taken out of that, see?

Q. Was that gross or take-home pay?

A. Take-home pay.

Q. I see, take-home pay. All right.

A. I believe.

Q. Well, is that your best recollection?

A. My check would run to two and a quarter, and there was deductions of 20% made.

Q. Was that every two weeks?

A. Every two weeks.

(Testimony of George H. Graham.)

Q. Now you notified the defendant in this action that you wanted to restore the \$1050 to them, didn't you? A. I did what?

Q. That you wanted to restore the \$1050 to them? A. Oh, yes.

Q. You sent that notice through us, did you not?

A. That's right.

Q. And you never received any answer to that, did you? A. (No response.) [51]

Q. Now let me ask you this: In 1943, were you involved in an accident with the Santa Fe Railroad? A. I was.

Q. And what was the nature of your injury at that time? A. A broken hand.

Q. A broken hand. Is there any question in this particular case as to an injury to your broken hand? A. No, just a broken hand.

Q. Well, I mean, are you suing in this case to recover any damages for a broken hand?

A. No. I brought action, but I withdrew it.

Q. You withdrew that action? Did you have an attorney representing you?

A. Mr. Thompson in Los Angeles.

Q. And did you ask him to withdraw the case?

A. That's right.

Q. It was dismissed, so far as you knew?

A. Well, they told me it was dismissed. They returned my evidence.

Mr. Baraty: The best evidence is the documentary evidence. Your Honor, that is asking for documentary evidence.

(Testimony of George H. Graham.)

Q. (By the Court): You don't know whether the attorney filed the papers or not in the case?

A. He filed them, your Honor; I asked him to withdraw them, and he gave me my papers back.

Q. You don't know what the papers he filed down there, though?

A. No, he filed them in the Superior Court.

Mr. Baraty: Well, that action is still pending.

Mr. Emmons: Well, that is a conclusion of counsel, and certainly this is no time to present it.

Mr. Baraty: Well, this testimony is a matter of documentary evidence.

The Court: Well, what has this got to do with this matter? We have enough cases to try now without adding one more to it.

Mr. Baraty: It has got something to do with this case; I did not object to it on that ground. It has got something to do with this case, it has something to do with that Rule 304. But my objection goes to this man's testimony now. He is talking about something that is a matter of record.

The Court: Yes.

Mr. Baraty: Documentary record, documentary evidence. If he wanted to dismiss that case, he ought to say so, so we could get it under oath.

The Court: Well, he has in effect said that. I will undertake to clear this up so that we won't waste too much time on it.

Q. (By the Court): You say you directed your attorney to dismiss that action? A. I did.

Q. When? [53]

A. Oh, it would be October, November of 1944.

(Testimony of George H. Graham.)

Q. And so far as you are concerned, you consider that you have withdrawn your claim?

A. Do I what?

Q. Do you now withdraw the claim and ratify whatever you told your attorney at that time to do in that regard?

A. That's right. I told him to withdraw from it and let the thing drop.

Q. And you consider that that case is withdrawn, and you are not asserting any claim under that case now?

A. That's right.

The Court: Now I undertook to do that, counsel; I assume that that is correct, and that you have something.

Mr. Emmons: That was the only information I had about it. It came to our attention this morning by virtue of the opening statement, and we had no thought about the hand injury whatsoever.

Q. (By Mr. Emmons): Now, Mr. Graham, you went to work for the Santa Fe Railroad in 1943?

A. That's right.

Q. And at that time did they give you a book of rules?

A. Yes, sir.

Q. And are you familiar with Rule 304?

A. I am.

Q. And at the time that you went to work for the Santa Fe [54] Railroad, was there any notation in your book that Rule 304 had been abrogated and was no longer in effect?

A. No, no.

Q. Did anybody tell you anything along that line?

A. No.

(Testimony of George H. Graham.)

Q. Did you have to study those rules before you went to work for the Santa Fe Railroad?

A. We had to write a book—contained all the rules.

Q. And was that one of them?

A. That was one of them.

Q. Now has there been an occasion, or have there been occasions, when one of those rules in that rule book have been modified or changed, that you know of? What is the procedure under those conditions?

A. Well, if a rule has been changed, they put a bulletin out. Well, I never have seen a bulletin to that effect, that that rule has ever been altered.

Q. Well, now, what is the general practice when a rule has been changed? They put out a bulletin, and then what happened to the rule book?

A. Well, they don't call them in. When a book comes in to the office again, they will open it up and paste a piece of paper across that rule.

Q. What about this bulletin now. Where does the bulletin come from? [55]

A. It comes from the superintendent's office, the trainmaster.

Q. And is that directed to the attention of everybody? A. Yes, that's right.

Q. Did you ever read such a bulletin in regard to Rule 304? A. Never did.

Q. Did you ever have any knowledge, if it was, that Rule 304 was abrogated or no longer in use?

A. I never heard of it.

(Testimony of George H. Graham.)

Mr. Emmons: Now, for the purpose of the record, your Honor, I would like to read into evidence Rule 304 of the Company Rules.

Mr. Baraty: We object to it on the ground that that rule was not in force at the time of this accident.

Mr. Emmons: May I have that objection?

Mr. Baraty: It is objected to as immaterial.

Mr. Smith: Page 34.

Mr. Baraty: We will be prepared to show that rule was abrogated in 19——

The Court: Well, you may do that, of course.

Mr. Emmons: Reading from the Rules and Regulations of the Operating Department of the Santa Fe Railroad, Rule 304 states as follows (reading):

“If employees are injured in any manner while in the service of this company, they will not be allowed to return to the service of the company [56] until they have executed a release or made satisfactory settlement with the proper officer and secured from him a clearance on account thereof; and the fact of employees re-entering the service of the company in any capacity after being so injured shall be taken and construed as a release of any or all claims of damage which they may have or claim to have against the company on account of such previous injuries, the re-employment of them by the company being acknowledged to be sufficient consideration for such release, notwithstanding they might not have received other compensation than such re-employment.”

(Testimony of George H. Graham.)

Mr. Baraty: Now, we ask that counsel read the date of publication of that book.

Mr. Emmons: Let's see—

Mr. Baraty: Right in the front.

Mr. Emmons: This is revised in 1927.

Mr. Baraty: That is what I wanted you to read.

Q. (By Mr. Emmons): Now this book that I have just read Rule 304 from, will you look at that and tell the jurors whether or not that is the rule book which was given to you, or a similar one, which was given to you as a guide in your operations of trains (handing to witness)?

A. Yes, that is identical, as far as I can see.

Q. Are those the rules, Mr. Graham, which the company required you to take an examination about? [57]

A. That's right.

Q. And you were examined on those rules, is that true?

A. Yes, sir.

Mr. Emmons: Would you like to adjourn at this time, your Honor?

The Court: Well, let's run a little longer. Have you finished the direct examination? Let's continue on for a while.

Mr. Emmons: I have some other rules that I would like to read into evidence, if I may, at this time.

The Court: Very well.

Mr. Emmons: Reading from the Rules and Regulations of the Santa Fe Railway Company, the Operating Department, Rule 93—

Mr. Baraty: We have no objection to that going into evidence.

(Testimony of George H. Graham.)

Mr. Emmons: Rule 93 reads as follows (reading):

“Stations having yard limits will be designated by special rules and timetables. Within yard limits, all trains and engines may use main tracks, not protecting against second or third class trains or extra trains, but will give way as soon as possible upon their approach. All except first class trains will move within yard limits at restricted speed. The responsibility for accident with respect to second or third class or extra trains rests with the [58] approaching train.”

Will you stipulate, counsel, that Rule 153 is of the same substance?

Mr. Smith: Yes, that's right.

Mr. Emmons: So that there are two rules which cover the restricted speed and the responsibility of the approaching train.

Mr. Smith: They cover substantially the same thing.

Mr. Emmons: Now reading from Rule 301-A of the Rules, the Santa Fe Rules and Regulations——

Mr. Baraty: Let me see that one moment, please.

(Conversation among counsel outside the hearing of reporter.)

Mr. Baraty: Well, in the interest of time, you may read them. If we have any objections, we will make them later.

Mr. Emmons: Rule 301-A is as follows (reading):

(Testimony of George H. Graham.)

“The Chief Surgeon, with approval of the General Manager, will issue rules governing physical examinations.”

Rule 301-C is as follows (reading):

“Employees who have been disabled by reason of accident or disease which predisposes them to sudden incapacity, or whose sight, color, sense or hearing has thereby become affected, must pass a satisfactory examination before resuming duty.”

Mr. Baraty: I don't think that rule is material in this [59] case.

The Court: No, I don't see the materiality of that.

Mr. Baraty: I object to it on that ground.

The Court: What do you have in mind, counsel?

Mr. Emmons: I think it will be connected up later.

The Court: Well, is there any point raised that plaintiff is in that category, that any of his senses were affected? What is the point of it?

Mr. Emmons: No, the point is this: The issue is raised here that the plaintiff had independent physicals. Now he was sent and ordered to go to the various hospitals and doctors that he went to by reason of the rules. He had no alternative. He had to go and see them.

The Court: I don't see the applicability of this last rule that you have just read. What is the relevancy of that to this case?

Mr. Emmons: That has to do with what doctors

(Testimony of George H. Graham.)

prescribed with respect to a man whose hearing is affected. In this case, this man was given a release by Dr. Morrison restoring him to full duty.

The Court: Yes?

Mr. Emmons: He wasn't able to return to full duty, and we want to show by this rule that he had to be subjected to such an examination before he could return to duty.

Mr. Baraty: I don't think that rule applies here, but—— [60]

The Court: Well, if you think it has some materiality, let it stand.

Mr. Emmons: It has some materiality. As it stands now, your Honor, it might not be so plain to see, but it will be.

The Court: All right.

Mr. Emmons: Rule 301-F reads as follows (reading):

“Physical examinations must be made by designated physicals.”

Now the examinations which he had were made by designated company physicians.

Q. (By Mr. Emmons): Now, Mr. Graham, have you received a bill from Dr. Fenlon for services he performed? A. Have I what?

Q. Received a bill for the medical services.

A. Well, I paid him some money, or my wife did. But I owe him some.

Q. About how much do you owe?

A. Oh, maybe two hundred fifty, a little more or less.

(Testimony of George H. Graham.)

Mr. Baraty: Well, I think that we ought to have a foundation.

The Court: Yes.

Q. (By the Court): He wants to know, is this doctor who sent you a bill for services or who made some charge?

A. Yes, he made some charge.

Q. Well, did he give you a bill in writing? [61]

A. No.

Q. Well, how do you know how much he charged?

A. I asked him one day about what my bill was.

Q. What?

A. And he says, "Oh, maybe \$250. But don't worry about it. When you get on your feet, why, pay me."

Q. (By Mr. Emmons): Now, other than Dr. Fenlon, have you been to see any other doctor?

A. Only Dr. Niemand.

Q. And is that Dr. Frederick Niemand of this city?

A. That's right.

Q. Whose offices are at 450 Sutter?

A. Yes, sir.

Q. And did Dr. Niemand take X-rays of you?

A. He took X-rays.

Q. When did he take these X-rays?

A. Well, it must be the later part of September or October, 1946.

Q. I see. And did Dr. Niemand tell you you had an injury other than those discussed at the

(Testimony of George H. Graham.)

time you talked with Dr. Morrison?

Mr. Baraty: Now, your Honor, that calls for——

A. Yes, he told me.

Mr. Baraty (continuing): That calls for hearsay, and no foundation. [62]

The Court: Yes, I will sustain the objection.

Q. (By Mr. Emmons): Now, did you learn from Dr. Niemand that you were injured?

A. I first learned from Dr. Fenlon.

Mr. Baraty: Same objection to that, your Honor; it is leading and suggestive, no proper foundation laid for it. Also, it calls for hearsay testimony.

The Court: Yes. Is this doctor going to testify?

Mr. Emmons: He is going to be here.

The Court: Then you can cover that through him.

Q. (By Mr. Emmons): Has Dr. Niemand as yet rendered a bill for services?

Mr. Baraty: Well, we will object to that as incompetent, irrelevant and immaterial. This doctor was not called, as I understand, ever to take care of Mr. Graham, but to be prepared to testify in this case. It is not material to the issues. It is not within the issues of the pleadings.

The Court: Well, I think counsel is correct there. I will sustain the objection. [63]

Q. (By Mr. Emmons): Mr. Graham, I neglected yesterday to ask you what your age was.

A. Fifty-one.

Q. Fifty-one. And what is the date of your birth? A. 1897.

(Testimony of George H. Graham.)

Q. And the date and month?

A. August 1st.

Q. Also, I neglected to ask you yesterday, at the time you offered to return the \$1050 to the defendant railroad, did you have that amount of money to repay them?

A. I did, yes.

Q. And was that offer made in good faith?

A. It was.

Mr. Emmons: No further questions, your Honor.

Cross-Examination

By Mr. Baraty:

Q. Mr. Graham, where were you born?

A. In Dickinson, Texas.

Q. What is the name of the place?

A. Dickinson. [64]

Q. How do you spell it?

A. D-i-c-k-i-n-s-o-n.

Q. What county is that in?

A. Galveston County.

Q. That is near Galveston, isn't it, Dickinson?

A. Twenty miles from Galveston.

Q. Twenty miles. Now where do you live?

A. At this time?

Q. If you please, yes.

A. Searchlight, Nevada.

Q. And the address there? A. Box 66.

Q. Post Office Box 66. And at the time of this accident, on July 6, 1945, where did you live?

A. Lived in Needles, but I still had a home up there in Searchlight.

Q. Needles, California? A. Yes, sir.

(Testimony of George H. Graham.)

Q. Did you have an address at Needles?

A. Well, called it the Barnham Courts.

Q. Barnham Courts?

A. (Shook head in the affirmative.)

Q. And did you live there with your family?

A. No.

Q. What did your family consist of at that time? [65]

A. Well, I have three children in Mexico City.

Q. You have—

A. By a former marriage.

Q. How old are they?

A. Well, one is about seventeen, and fifteen and fourteen.

Q. Oh, you have three children? A. Yes.

Q. They are all in Mexico? A. Yes, sir.

Q. With your former wife?

A. Former wife.

Q. Now what was her name? A. Maria.

Q. Maria? A. Yes.

Q. That was her given name?

A. That was her given name.

Q. Now then, you entered into your present marriage—— A. How's that?

Q. When did you enter into your present marriage?

Mr. Emmons: I will object to that as being incompetent, irrelevant and immaterial, your Honor. It has no bearing upon the issues of this case.

Mr. Baraty: Well, he said he is married. Let's find out about it. We are entitled to know that. [66]

Mr. Emmons: Incompetent and irrelevant.

(Testimony of George H. Graham.)

The Court: What is the bearing upon this accident?

Mr. Baraty: Well, it may and it may not be.

The Court: The wife is not making any claim, is she?

Mr. Baraty: No, the wife is not making any claim, but there has been testimony here on direct examination that his wife has taken him here, there and elsewhere; I would like to know the circumstances. I think we are entitled to it.

The Court: Well, your question was, when was he married.

Mr. Baraty: Yes.

The Court: Well, what difference would that make?

Mr. Baraty: Well, it might have some bearing to the other situation.

The Court: I don't think we are here to speculate about those things. If you make a representation that when the man was married will have some definite pertinency to the facts of this accident, why, I will accept your statement of that, but off-hand, I wouldn't think it would have any. It wouldn't even make any difference if he wasn't married. What has that got to do with the cause of action here?

Mr. Baraty: It goes to the matter of his veracity, if he wasn't married, on cross-examination.

The Court: Well, I shall sustain the objection unless there is something more persuasive.

Q. (By Mr. Baraty): What is the given name

(Testimony of George H. Graham.)

of your present wife? [67] A. Sally.

Mr. Emmons: Same objection.

The Court: Well, I will overrule the objection on that.

Q. (By Mr. Baraty): What is the name, please?

A. Sally.

Q. How do you spell it? A. S-a-l-l-y.

Q. Sally. And did you maintain a residence at Searchlight, Nevada, with your wife, Mrs. Sally Graham, at the time? A. I can't hear you.

Q. At the time of this accident—you didn't hear me?

A. I didn't hear all the question.

Q. Oh. Did you have a residence at Searchlight, Nevada, with your wife, Mrs. Sally Graham, at the time of this accident, July 6, 1945?

A. No, but I had an old cabin up there in Searchlight when I was looking the country over.

Q. Well, did Mrs. Sally Graham live there and you live in Needles?

A. She was the Postmistress there at the time, and I married her after the accident.

Q. You married her after the accident?

A. That's right.

Q. How soon after the accident?

A. Well, in December. [68]

Q. December of 1945? A. Forty-five.

Q. Where did that marriage take place?

A. In Quartzite, Arizona.

Q. How do you spell that?

A. Q-u-a-r-t-z-i-t-e.

(Testimony of George H. Graham.)

Q. Arizona. What county is that in?

A. I think that is Yuma County.

Q. Yuma. Now, sir, how long have you been in the railroad business?

A. Well, I started along about 1919.

Q. Started when? A. About 1919.

Q. What was your first railroad job?

A. On the I. & G. N.

Q. What does that mean? A. How's that?

Q. What is the name of that?

A. International and Great Northern.

Q. International and Great Northern. Where?

A. San Antonio, Texas.

Q. San Antonio. And how long were you with that company? A. Oh, about a year.

Q. As a brakeman?

A. As a brakeman. [69]

Q. Has your experience, then, with railroads, been limited to a brakeman's job?

A. Well, brakeman and switchman, engine foreman.

Q. Switchman, flagman? A. How's that?

Q. And flagman? A. And flagman.

Q. Yes. Now, did you have any other railroad experience?

A. Yes, I went over to the G. H. & H. at Galveston.

Q. That is the Galveston, Houston and Henderson? A. That's right.

Q. Runs out of Galveston?

A. Well, it runs to Houston.

(Testimony of George H. Graham.)

Q. And how long were you there?

A. About two years.

Q. What years?

A. Oh, twenty-one and twenty-two.

Q. Then the next railroad experience?

A. The Port Terminal at Houston.

Q. Port Terminal at Houston?

A. That's right.

Q. In the same capacity?

A. As switchman, engine foreman.

Q. And how long were you there?

A. About a year. [70]

Q. One year. And then again, what followed with railroad experience? A. How's that?

Q. What was your next railroad experience?

The Court: Mr. Baraty, he seems to be a little bit hard of hearing. Maybe if you would come up here, it would save repeating the questions.

Mr. Baraty: Yes, thank you very much. I thought I had a voice that was unduly rough.

The Court: No, I think you speak rather softly.

Q. (By Mr. Baraty): Tell me, when were you with the Port Terminal at Houston?

A. In forty-two.

Q. In forty-two. And then after that?

A. I came to the Santa Fe at Needles.

Q. In Forty-three? A. Forty-three.

Q. So the gap of twenty years between the G. H. & H.—you were not employed in the railroad business? A. No.

Mr. Emmons: I think you have omitted the

(Testimony of George H. Graham.)

third one, the Port Terminal at Houston, Texas, counsel. You didn't ask him for the years.

Mr. Baraty: Yes, I asked him; he said forty-two, Mr. Emmons, if I am right. [71]

Mr. Emmons: That's right, I am sorry.

Q. (By Mr. Baraty): That was in forty-three, is that right? A. That's right.

Q. And then the Santa Fe in forty-three?

A. That's right.

Q. So for approximately twenty years, between 1922 to 1942, you were not engaged in the railroad business, were you? A. No.

Q. What did you do, what type of work?

A. Well, I was in Tampico, Mexico, in the oil business.

Q. In the fields drilling?

A. Drilling and contracting.

Q. Manual labor? A. Oh, yes.

Q. Now, did you ever work for the Santa Fe before your employment in the year 1943?

A. No.

Q. Did you ever work for the Atchison, Topeka and Santa Fe in the year 1916 or thereabouts? A. No.

Q. Did you ever work for the Atchison, Topeka and Santa Fe in the year 1916 or thereabouts out of Needles, California? A. No.

Q. Did you ever work for the Southern Pacific Railroad Co.?

A. I worked for the Southern Pacific in El Paso, Texas. [72]

(Testimony of George H. Graham.)

Q. And when was that?

A. Oh, that was in the latter part of twenty-two.

Q. How long was that?

A. Oh, I wasn't there a month?

Q. Just one month. As a brakeman?

A. No, it was a switchman.

Q. As a switchman. Will you pardon me? I get those employments confused.

Now, on this particular job that you had at the time of the occurrence of this accident on July 6, 1945, your job with the Santa Fe was—you tell me what it was. A. As a flagman.

Q. Flagman. And is that in the category of a—I will get it right—brakeman?

A. It was a brakeman, but it is the customary thing with the rear man, what they call the rear man, is a flagman. He is a brakeman, but in the capacity of a brakeman, and he is the flagman at the same time.

Q. The flagman takes care of the rear end of the train? A. That's right.

Q. Now, you left Needles, California, to go east; that is, the direction of Seligman, Arizona, I suppose, on, I guess it was the 4th of July?

A. We did leave on the 4th of July.

Q. And so I am directing your attention to the day that you [73] went back East, before coming back toward the West.

A. That's right.

Q. And that day when you left Needles, the 4th

(Testimony of George H. Graham.)

of July, were you in good health? A. I was.

Q. Through and through?

A. Through and through.

Q. You are not affected with any nervousness or dizziness or anything? A. No.

Q. Or any injuries to any of the muscles or bones of your body? A. No.

Q. All right. So that at Seligman, you spent the night of July the 4th, so that you would come back on the 5th of July toward Needles, toward the West, right? A. That's right.

Q. On that job, you left Seligman, Arizona, at what time, about, on the 5th of July?

A. 11:00 o'clock in the morning.

Q. About 11:00 o'clock in the morning. And of course, it was a hot, sunny day?

A. Well, the weather was clear.

Q. Yes. Well, maybe it wasn't too hot, because you are used to it. It might be to me. But at any rate, what was it, [74] 150 miles or thereabouts?

A. 154, or fifty-three, to be exact.

Q. Well, I wasn't holding you to the exact mileage. Any way, everything went along satisfactorily, and the train got into the yard limits of Needles, California, along about one o'clock in the morning of the next day, which would be July 6, 1945?

A. That's right.

Q. And did you stop along the road at all? I mean, did the train stop from Seligman to Needles that day? A. All day long?

Q. Were you switching cars? A. No.

(Testimony of George H. Graham.)

Q. Taking on cars? A. No.

Q. You just brought this train of 70 odd cars from one destination to another?

A. (Shook head in the affirmative.)

The Court: You will have to answer, because the reporter can't get your answer if you just nod your head.

The Witness: Oh, I see.

Q. (By Mr. Baraty): Now you had made that trip, I assume, many times before?

A. I have.

Q. Was that a regular run for you, or were you in what is called "on the board"? [75]

A. That was a pool job, and I was on a regular run.

Q. And when you say "pool," what do you mean? A. Well, a pool——

Q. You have got to wait until your name comes up and all the men are in a pool?

A. All the men are in a pool, and work first in and first out.

Q. Now then, this diagram which might be hard for me—I am not criticizing except that I am criticizing myself—it might be hard for me to understand. So if I am in error, don't hesitate, Mr. Graham, to point it out. At this time, we have the south at the top. And to the west—I am going to take the liberty of putting a "W" over here, which indicates "west," is that right?

A. That's right.

Q. And I still do the same over here, I will

(Testimony of George H. Graham.)

take the liberty of putting an "E," which means "east." Mr. Emmons has properly designated the north at the bottom. Now there is a passenger, a west-bound passenger, track that runs in as you approach Needles, is there not?

A. There is.

Q. And that west-bound passenger track goes right into the station with passenger cars?

A. That's right.

Q. And at some place along the line before you approach Needles, why, freight cars leave that west-bound main line, to go into [76] the freight yard in the freight yard limits, and then to go into the tracks where they ultimately are deposited for unloading?

A. Yes, they head in way down there on the east end. There is a long lead that comes into No. 20 track.

Q. Yes. Well, there is a long lead. Now by lead, you mean there is a track, this No. 20 track, somewhere beyond the limits of this board in the eastern direction, comes off the passenger west-bound track, doesn't it?

A. Way down below.

Q. Way down below. In other words, you can't get on this No. 20 track, which is a freight track, unless you come off the west-bound passenger main?

A. Well, in other words, you have to come off the west-bound.

Q. Yes. Now, can you tell us what your understanding is of a "lead" track?

(Testimony of George H. Graham.)

A. Well, it is an extension of a track heading into a yard or leading off anywhere along a track, going off in another direction. We call that a lead. But generally, a lead is down a track where all the other switches branch off it.

Q. That is what I was going to say. In other words, from No. 20, there are many other tracks—19 here, 18, 17, 16, off of which cars are put or deposited—or, as you say, spotted?

A. Spotted, that's right. [77]

Q. In other words, a lead track isn't a track where a train stays permanently? A. No.

Q. No. So that your train of—how many cars did you say? When you got on the train, that is?

A. I would gather we have about 70.

Q. About 70 cars. And do they average about forty or fifty feet?

A. Forty, no less than forty—up to fifty.

Q. Well, that might be what, about three hundred feet from the engine to the caboose, or something like that?

A. Oh, longer than that.

Q. Well, my mathematics may be very poor, but will you wait until I—70 cars at forty. I should say I was wrong. About three thousand feet, would it be? A. Yes, a long ways.

Q. Yes. Well, I am glad I put it down here, anyway. So the caboose, when the train came to a stop on No. 20, the lead track, was about three thousand feet away from the—I am not holding you to that number of feet, but I just want to

(Testimony of George H. Graham.)

show the general distance—from the engine, right?

A. It would be, well—if it was 70 cars, it would be a long ways up to the engine.

Q. Yes. Now, how far was the caboose from the switch when it came to a stop? How far was it away from the switch on the [78] west-bound passenger main track?

A. Oh, Lord, we were probably a mile; it is a long, long track.

Q. Well, was it longer than the distance from your caboose up to your engine? A. Oh, yes.

Q. I see. All right. Now, when you came into Track 20, your train finally stopped, did it?

A. It did.

Q. It stopped. And it was stopped for how long, sir?

A. Oh, about thirty minutes, about.

Q. Before this accident?

A. About thirty minutes.

Q. About thirty minutes. Now what did you do as flagman on that train from the time you stopped until the time of this accident?

A. Oh, we pulled into 20, and I waited a little while, and I saw we wasn't going in, so I took down my markers, put them away, and crawled up in the cupola.

Q. Can I interrupt you? You gave me a thought there that I wanted to mention. You say you hauled down or pulled down your markers. Will you explain to the jury and to me what a marker is?

A. A marker is two lamps on either side of

(Testimony of George H. Graham.)

the rear of the caboose. When they are turned one way, they are red, and when they are in the clear, or the main line, or in a passing track, [79] you turn them and they are yellow. Without a marker, there is no train; but when those markers are up, then it is a train, if it is only an engine. If that engine is alone and single and has markers on it, on the back of it, it is then a train. Or it could be 5,000 cars, but if there are markers on the caboose behind it, it could be a train. But without markers, it is nothing.

Q. All right. Without markers there is no train?

A. There is no train.

Q. Now on markers, a marker is a kind of lamp, isn't it?

A. It is a lamp.

Q. A kerosene lamp?

A. Well, we burn a composition oil in there.

Q. Yes. It doesn't work by electricity on freight trains?

A. Oh, no, no.

Q. And its size is what, about a foot high?

A. About that high (indicating).

Q. About two feet or a foot and a half. And it fits in a slot?

A. In a slot.

Q. On the rear of each side of the train?

A. That's right, there are little slots up there, and you would sit them right (indicating).

Q. And that is, you turn it so that it has three types of colored lens, don't you? [80]

A. Well, you have got two colors—yellow and red.

Q. Don't you have a green?

A. No, no.

(Testimony of George H. Graham.)

Q. You don't have a green? A. No.

Q. All right. Now, as you came into the yard limits there, or as you came in on No. 20 off the west-bound passenger main, what did these markers, what color did these display?

A. I had them turned yellow.

Q. You had them turned yellow?

A. After I got off the main line.

Q. What were they on the main line?

A. Red.

Q. They were red. And when did you turn them yellow?

A. When I got in the clear on the long lead, heading in.

Q. When you got off the main line and went on No. 20?

A. That's right—no, coming in off the long lead. We hadn't reached No. 20 yet.

Q. There is another one: what do you mean by "long lead"?

A. Well, that long lead from this switch, No. 20 there. It goes back there for a mile, where you head off the west-bound main line.

Q. And you were coming into the yard limits then?

A. We were coming into the yard limits, and we were in the yard limits. [81]

Q. Where is the yard limits with reference to the place where this car had stopped?

A. East of that east switch, the head end switch.

Q. Now, was it then after you had come off the

(Testimony of George H. Graham.)

west-bound passenger main that you turned the red to the yellow? A. That's right.

Q. And they were displaying that colored yellow light when you went back on the platform and took them down?

A. They were still displaying yellow.

Q. Yes. And you took them down, did you?

A. Yes, I took them down after we went in No. 20.

Q. With the result that there was no train there at all, as far as railroad men knew?

A. We were through.

Q. Yes? A. Practically through.

Q. Now, how much further was it that this train had to go before it got to a siding where it was deposited for the rest of the night, or until it was unloaded or moved again?

A. Well, it would have to head into the other yard. I would say maybe a half mile, or it might be a mile.

Q. A mile ahead of the engine?

A. Well, you have got to head up and go right into the train yard.

Q. So you were there that half hour with no markers displayed? [82] A. How's that?

Q. No markers displayed for half an hour?

A. No.

Q. Now, what did you do after you took the markers off?

A. I crawled up in the caboose, in the cupola.

Q. You went up the ladder to the place where

(Testimony of George H. Graham.)

this seat was that was assigned to you as flagman?

A. Yes; that's right.

Q. On the right-hand side of the train looking forward?

A. That's right.

Q. The same side as the engineer?

A. That's right.

Q. And what were your duties up there at that time?

A. Well, I just was waiting to be pulled into the yard.

Q. Well, were you awake or asleep?

A. Oh, I was awake.

Q. One o'clock in the morning, half-past one, but you were not doing anything up there?

A. No.

Q. Well, now, as you sat up there, what drew your attention to something out of the ordinary, if anything?

A. Well, I seen a reflection. I looked back, I thought maybe there was a train coming down the main line, on the west-bound main line, and it kept coming and I swung around, I could see it was in behind those outfit cars. Then I knew [83] there was another train or something coming in there.

Q. What side of the caboose? Now, I understood that you depicted this as the caboose, and I think here on the right-hand side, as you looked toward the west would be about your position. Now where are these outfit cars that you talk about?

A. Where that short line is up there.

Q. Number 19?

(Testimony of George H. Graham.)

A. No, east of that. That little short line (indicating).

Q. Over here? A. Yes.

Q. Way in the back. Well, that would still be, that would be to the south of your train, wouldn't it? A. No, it would be east.

Q. Well, here's your track here, 20, and if this short line here is what you and I understand each other to mean, it would be south of 20, wouldn't it?

A. It would be south of the long lead there.

Q. Yes. A. Yes, that's right.

Q. And it would be east, of course, of your——

A. That's right.

Q. Of your caboose's position. Now you saw a reflection from a headlight? A. That's right.

Q. Was it shining on your caboose? [84]

A. Oh, you could see the reflection, see it shooting way up the river. That is what drew my attention to it. I turned around.

Q. Oh, it wasn't in a straight line then, like this No. 20 is on this blackboard; it was shining over here into the river?

A. Like that, as it was coming around the curve.

Q. It was shining to the north, because it comes around a curve on the on the other end of this blackboard, doesn't it? A. Yes.

Q. It starts to curve from the south?

A. It was just a long curve there.

Q. A long curve from the south?

A. From the east.

Q. It is from the south-east?

(Testimony of George H. Graham.)

A. No, from the east.

Q. From the east.

A. Coming down the long lead.

Q. So at the time you came around the curve, the light of the engine shown into the river. All right. Well, now, how long was it before that engine collided with your caboose? How much time?

A. From the time I first saw it?

Q. Yes, sir; from the time you first saw the light. A. Oh, about two minutes.

Q. Two minutes. Now what did you do, then, when you saw [85] this light on this approaching engine?

A. Well, I stuck my head and shoulders out the window and my electric lamp, railroad lamp, and he kept coming and I swung him down (indicating). There was no answer, and I got down and went back on the rear platform, and by that time he was pretty close to me.

Q. Well, you were sitting up here in your place on the right-hand side of that cupola there, with your back toward the oncoming engine—that's right, isn't it? A. That's right.

Q. And now did you look back to see what it was when you saw this light?

A. Sure, certainly I looked back. I stuck my head and shoulders out the window.

Q. Looked back out the window like this (indicating)? A. That's right.

Q. And then you gave this type of a sign (indicating)?

(Testimony of George H. Graham.)

A. Out the back of the caboose, like that.

Q. Well, you were on the side of the——

A. Well, yes, I can reach around.

Q. Oh, reaching around in back?

A. In back of the cupola.

Q. I see. Now, were you looking back, then, to see if there was any response?

A. Yes, I was watching. [86]

Q. And you got no response?

A. There was no response.

Q. All right. So then what did you do?

A. Well, I got down out of the cupola and walked to the back platform.

Q. Now, you came down the stepladder, the grabirons there?

A. The ladder, grabirons there.

Q. There are about four of them there, aren't they?

A. Oh, on some of them there's three, some four, some five.

Q. I think you said yesterday that the floor of the cupola was about five or six feet above the floor of the caboose proper?

A. Well, the platform used to be just about my chin.

Q. Well, then it is about five feet, then. All right. You came down the ladder into the isleway there under the cupola, huh? A. That's right.

Q. And then what did you do?

A. Well, I went back to the platform, the rear platform.

Q. You went back to that platform, and there is a regular platform there with a railing?

(Testimony of George H. Graham.)

A. That's right.

Q. And steps on each side that a man can use to go down to the ground?

A. That's right. [87]

Q. Well, what did you find when you got down there, and how did you view the situation?

A. Well, I saw he was getting pretty close to me, and I didn't even have time to get a fussee out and bust that, and I looked at the river and I didn't want to jump that way, and I looked at the other side and there was a pile of ties all strewed up and down between 19 and 20 tracks, so I thought pretty quickly. I said, "The safest place for me is in the cupola, and then if he hits, I can get out of the window."

Q. So what did you do then?

A. Well, I made a jump for the steps going up and got up there and was just crossing over to get on my side when they hit. That is about the end of it.

Q. That crossing-over is about the size of one of these squares here in the courtroom?

A. No—well, a little wider.

Q. About how many feet would you say?

A. I would say three feet or two and a half feet across.

Q. Well, you could step over there without any difficulty; your legs are rather lengthy?

A. Without any trouble.

Q. You could do that all right, couldn't you, under ordinary circumstances?

(Testimony of George H. Graham.)

A. All the time, yes.

Q. Yes. Now to dismount from the position in your cupola to [88] get over to where the steps were, you had to stretch that length of whatever it was, three feet or something, to get over to the ladder and come down?

A. You have to step across to get down.

Q. And you did that and got down safely and went down on the rear platform, and then came back and went up on the ladder. Then you were up on the ladder on the left-hand side, which is the side where the other brakeman sits?

A. It wouldn't be—it would be the left-hand side, east and west.

Q. Yes. Facing forward, toward the forward end. And nothing had occurred up to that moment, had it?

A. No, just as I was stepping across and I passed the place.

Q. And was there another brakeman in that cupola at the time of the crash?

A. I don't remember whether he was up there in the cupola with me or whether he was down, laying down.

Q. His name was Reinhardt, wasn't it?

A. That's right.

Q. You don't recall whether he was up in his seat?

A. I can't. I wouldn't be able to say for sure though.

Q. His designated seat was the left-hand side,

(Testimony of George H. Graham.)

wasn't it? A. Left-hand side.

Q. And do you have any memory of his presence at any place in the caboose at the time of the collision? [89]

A. Well, he was in the caboose.

Q. Where?

A. Well, that I can't tell you exactly. I don't know, I don't remember.

Q. So that in stepping across to go to your place on the right-hand side looking forward, did you get over there before the collision?

A. I think I was just stepping over when they hit.

Q. All right.

A. Whether I got clear over, I can't tell you. It all happened so quickly, I don't just remember.

Q. And when the collision actually took place, what happened to you?

A. Well, it threw me up and jerked loose everything. The car went up an incline, like that (indicating). The caboose did, rather. And I went down to the floor.

Q. You went down to the floor of the caboose?

A. That's right.

Q. What part of your body struck the floor of the caboose?

A. Oh, I struck on my back and hip and the back of my head and shoulder.

Q. And you got up right away, didn't you?

A. I was getting up, trying to get up.

Q. Well, did you get up?

(Testimony of George H. Graham.)

A. I don't know whether I got clear to my feet or not. [90] I can't answer that, because I was groping my way around in the dark there. My lamp was out and my glasses was off somewhere and all of a sudden, down I go again.

Q. And then when you went down the second time, were you back in the isleway in the caboose?

A. Yes, I was.

Q. And did you get up the second time?

A. I got up and slid around and slid down into the doorway and outside.

Q. Got out on the platform and down on the steps?

A. Sliding right out. It was on an angle like that, then (indicating).

Q. Yes. Now, what side of this train did you get out on, this caboose?

A. I got off between 19 and 20 track, on the left side.

Q. That would be on the outside?

A. Outside.

Q. And what is the first thing that—how were you feeling?

A. Well, I don't know; I was feeling pretty well shot all to pieces.

Q. What was hurting you, if anything?

A. I was just numb and terrible pain in my head.

Q. Well, you did develop a bump, a lump on your head, didn't you?

A. On the back of my head here (indicating).

(Testimony of George H. Graham.)

Q. That subsequently disappeared, didn't it?

A. Yes, that has disappeared. The head X-ray I had——

Q. Oh, so do you remember what you did when you got down on the ground?

A. Well, I have a faint recollection. I wouldn't take an oath that I did it or didn't do it. But I think that I had presence of mind to go down and cut a couple of cars off. It was all smashed up and things strewed around there, and I have that recollection. Now whether I did or not, I don't know, Mr. Baraty. I assume I did.

Q. Well, that is the information everybody had, that you did your job and cut off the caboose, and the car that was in front of it. So that from there on, what did you do?

A. Well, I came back to the caboose, and that engineer was there hollering his head off.

Q. Well, what was the engineer hollering his head off about?

A. About the markers being down; I remember that.

Q. Yes. He said something to the effect, "Why didn't you have these markers up here? I didn't know you were here," or something like that, didn't he?

A. I think it was something along that general line.

Q. The discussion got to such a heated point that there was the possibility of a fist fight right then and there? A. No.

Q. Didn't get that far? [92]

(Testimony of George H. Graham.)

A. No, I don't think so; I don't remember that.

Q. Now then, from that point, and after that discussion with the engineer, what did you do from there? What was the next thing you did?

A. Well, I think some one of the engine crew, or somebody, called—they have a station wagon that carries crews back and forth from that east end out there back to the station.

Q. You mean an automobile?

A. An automobile

Q. Yes?

A. Well, I went over to the main line there, and the rest of them came over, I believe, and there was some passenger train came through and stopped right where I was, and there was a vestibule door open, and I crawled on to it.

Q. I forgot to ask you, what was that train stopped there on 20 for, for half an hour?

A. On 20?

Q. Yes.

A. Waiting to get into the yard.

Q. Your conductor was at the head end waiting for directions to deposit his train on one of the final resting places in the freight yard?

A. In the freight yard.

Q. Yes. Now, do I understand you to say, that, after the accident, after you had talked or had a discussion with the [93] engineer, after the two cars had been cut off, that a station wagon took you down to the east end, to the passenger track?

A. The station wagon comes clear up from

(Testimony of George H. Graham.)

the depot.

Q. Yes. That is the west end?

A. Down there. Then it picks up the engine crews and takes them in. That is where they exchange the crews.

Q. Well, what did that have to do with your situation?

A. Well, I didn't go up in the station wagon.

Q. Well, that is what I thought.

A. I crawled on this passenger train. The rest of them come up in the station wagon, as far as I know.

Q. Well now, then, from the end of your caboose, you walked back along 20 on the freight lead to the west-bound main track, did you?

A. I walked over there.

Q. That is over a mile?

A. Oh, three-hundred feet.

Q. I thought you told us a while ago that where you come in off the main line up to the place where you stopped, it was over a mile.

A. It is a mile back to the head end switch, where my caboose was standing; there is your west-bound main line, probably two hundred, two hundred fifty, or so over there, right up where that curve is there (indicating).

Q. Oh, but there is no switch in, at that three hundred feet [94] distance, is that it?

A. No.

Q. Oh, I see. In other words, you left the freight lead and walked across free country, open land?

(Testimony of George H. Graham.)

A. Point to your caboose there.

Q. Yes, sir?

A. And cut right across that curve there.

Q. Oh, you went over these other tracks?

A. I cut right through there.

Q. You cut right through here?

A. Right there. The pointer is right on the west-bound main line.

Q. You did all that in the dark?

A. How's that?

Q. It was dark? A. It was dark.

Q. You didn't have any lantern or light?

A. Lights—oh, I had my lamp.

Q. Did you have your lantern?

A. I found it.

Q. It was working? A. Oh, yes.

Q. You didn't have your glasses on?

A. No, I didn't have any glasses on.

Q. Well, you walked these three hundred feet over these [95] various freight car tracks to the main line? A. I did.

Q. To the passenger line. And you got on the passenger train?

A. There was one just came in there, pulled in there. There was another one ahead of him, and he stopped, and this fellow was on his block, a red block ahead of him, and he had to stop there just for a moment. Then he pulled on into the passenger yard.

Q. Did you get on the train? A. No.

Q. Did you get on the engine, I mean?

(Testimony of George H. Graham.)

A. No, I got on one of the rear cars. I think it was the rear car.

Q. The doors were open? A. Yes.

Q. And you got aboard?

A. Those doors there——

Q. And you got aboard, you got on?

A. I did.

Q. And how far was that to the station?

A. Oh, that is a mile or over.

Q. Oh, so you rode in a mile to the depot at Needles? A. That's right.

Q. Well, what did you do then, sir?

A. Well, I got off and got up to the crew dispatcher, got up [96] to the office, and a bunch of men crowded around me and wanted to know what the trouble was and where the accident was and how about it. I didn't know. I just—then a fellow named Beadle took ahold of me and wanted me to come. He wanted to take me to the hospital.

Q. What is his name? A. Beadle.

Q. What is his capacity?

A. He is the night crew dispatcher there.

Q. He is the night crew dispatcher, and he wanted to take you to the hospital? A. Yes.

Q. The Santa Fe Hospital Association maintains an emergency hospital at Needles?

A. That's right.

Q. That is open night and day, twenty-four hours a day? A. If you can get in.

Q. There are some beds there?

A. Well, yes, there are beds there, but that is

(Testimony of George H. Graham.)

all. I know from experience that you can't get in the hospital unless you have got an amputated leg or something.

Q. There is always a nurse in attendance?

A. There is, but they don't give you any prompt treatment.

Q. And there is always a doctor available in small places like Needles? [97]

A. In emergencies, yes.

Q. At that time you told Mr. Beadle or Beale or whatever his name was, that you didn't want to go to the hospital?

A. I wouldn't go to the hospital, that present doctor down there.

Q. With what?

A. With the doctor they had in charge. I didn't want him to touch me or see me.

Q. What was his name? A. Tyerman.

Q. Did you know he was on duty that night?

A. He was the only company doctor there.

Q. I see. So what was your ailment at the moment?

A. Well, just severe shock and pain, and my back and my hip and my whole leg seemed to be just, well like it was asleep. And my head was busting open with the pain. It might have been from the bump, or whatever.

Q. So did you sign off at the crew dispatcher's office then? A. I don't remember.

Q. You didn't sign what is known as the "law sheet"? A. I don't remember.

(Testimony of George H. Graham.)

Q. You don't remember doing that? Did you tell Mr. Beale, or the crew dispatcher there, or anybody there, or anybody in the office of the railroad company that you were hurt and needed medical attention? [98]

A. Well, everybody knew it. I didn't have to tell them.

Q. Well, did you tell anybody?

A. Well, they could see it.

Q. What?

A. They could see that I was hurt.

Q. Well, did you tell anybody you wanted medical attention?

A. Yes, I think I told Beadle and several around there that I was hurt.

Q. Did you ask them to send you to Los Angeles to the Santa Fe Hospital Association Hospital, there in Los Angeles?

A. Not at that time, no.

Q. You did not? Well, what did you do?

A. Well, there was some man there—I don't remember who he was or what, some railroad man, some brakeman—had his car there. He said, "I will take you home," and he took me over and the car was parked over on Front Street, and I got in and he took me on home.

Q. Now when you say, "home" you mean the bungalow or cottage or court that you occupied?

A. That right.

Q. Did you say on Broad Street?

A. It is the Bonham Courts.

(Testimony of George H. Graham.)

Q. Bonham Courts. That is it. And that is where you lived at the time?

A. I had a cabin there. [99]

Q. Yes. Now did you go to bed that night?

A. No, I don't think so. I think I went right to Searchlight. I was sopped with blood, and I put some adhesive tape up over my eye and got in my car, and I think I went on straight to Searchlight.

Q. Well, then, it must have been what time in the morning, two or three o'clock?

A. Oh, it was maybe two-thirty.

Q. Just two-thirty in the morning. Three maybe.

A. I don't remember that.

Q. Well, it was before daylight?

A. Oh, it was dark.

Q. Yes. And your car was available at your place where you lived?

A. Right alongside the cabin.

Q. Were you in pain then, sir?

A. How's that?

Q. Were you in pain? A. Very much.

Q. Where were you in pain?

A. Right in the back of my hip.

Q. Did you have a headache?

A. Terrible headache.

Q. Were you bleeding?

A. Well, my head wasn't bleeding, but my eye was bleeding, and [100] my head, in the back, felt like I had been kicked by a mule or something.

Q. So you drove to Searchlight, Nevada?

A. I did.

Q. How many miles is that from Needles?

(Testimony of George H. Graham.)

A. Fifty-four.

Q. Did anybody go with you to Searchlight, Nevada? A. No.

Q. What did you go to Searchlight, Nevada, for? A. I went home.

Q. You went home?

A. I went home, to go up there where I had a cabin and get away from Needles.

Q. Did you have——

A. I had no cooling system there in Needles in that cabin, and I did have up at Searchlight, where I could be comfortable.

Q. Well, you had two places of abode, one in Searchlight and one in Needles?

A. I did have.

Q. And you wanted to get away from Needles?

A. Yes.

Q. Was there a doctor at Searchlight, Nevada?

A. No, he was at Boulder City.

Q. And how far is that from Searchlight, Nevada? A. Forty miles. [101]

Q. Another forty miles. There was no Santa Fe Hospital Association Emergency service at Searchlight, Nevada? A. No.

Q. The Santa Fe doesn't go to Searchlight, Nevada? A. No.

Q. It doesn't go to Boulder City, Nevada?

A. No, it doesn't go to Boulder City. No.

Q. Well, now, what was the—did you have any other purpose of going to Searchlight, Nevada?

A. Well, it may have been, I formed a habit,

(Testimony of George H. Graham.)

because I used to go in off the road and go right up there, and then come back and go right out and go to work. It might have been force of habit, but I did not want to go over to that Santa Fe Hospital at Needles.

Q. You made that trip without any trouble that night in the automobile, that fifty-four-mile trip?

A. I got in the car and just went right along. I took my time and got up there.

Q. I see. All right, now, you were up at Searchlight, Nevada, and then what did you do?

A. I went to bed.

Q. Did you take care of yourself?

A. The lady I married did. She took care of me.

Q. Oh. What was necessary for you to have done?

A. Oh, she just took a razor blade and shaved the hair off [102] my eye there and put some adhesive tape there and pulled it together, and I just went to bed.

Q. And you rested that night until when? How long did you stay in bed?

A. Oh, I stayed there in bed, I guess, until around the morning of the 9th.

Q. So you got up there on the morning of the 6th of July? A. Yes.

Q. And you stayed in bed from the time you got up there through the 6th, all day the 7th of July, all day the 8th of July, and now we're in the 9th of July? A. Yes.

Q. And during that time, you didn't seek the attendance of any medical aid of any kind?

(Testimony of George H. Graham.)

A. No, I was able to walk. I could get around, and move around, and didn't want anything to do with that Dr. Tyerman. That was in Needles—please understand me on that—because he was just too much for me, and most everybody else.

Q. Well, please understand me, if you will; I asked you if you stayed in bed on July 6th, 7th, 8th, and the 9th. You went along with me, and you led me to believe that you understood. Now you have just told me that you were up and around. Now can we have the chronology of your—

A. Well, I had to get up to go into the wash-room.

Q. That's right. Well, was that the limit of your physical [103] exertion to go to the toilet or the washroom? A. That's right.

Q. And otherwise, you were in bed?

A. That's right.

Q. So we are agreed on that?

A. That's right.

Q. Up until the 9th? A. That's right.

Q. Until about what time?

A. Oh, I should think we left there about, well, before noon. I can't tell you off-hand.

Q. And all that time you were a member in good standing with the Santa Fe Hospital Association and could demand medical service, if you wanted to, couldn't you? A. I could, yes.

Q. Yes. And so on the 9th of July, 1945, what happened there?

A. Well, I went to Boulder City.

(Testimony of George H. Graham.)

Q. Well, I mean, about what time of day?

A. What?

Q. About what time of day?

A. Well, I would say it was a little before noon sometime. I can't tell you the exact hour.

Q. And you went to Boulder City, Nevada. Now what was the purpose of that trip?

A. To go up and see Dr. Fenlon. [104]

Q. May we have you spell his name?

A. F-e-n-l-o-n.

Q. And his initials, do you know them?

A. R. L.

Q. That is about forty miles away, again, from——

The Court: That has been asked and answered several times.

Mr. Baraty: That's right.

The Court: I wonder whether we couldn't move along a little faster, if you will, Mr. Baraty? I think you repeat the answers and ask the same questions so many times.

Q. (By Mr. Baraty): Did you drive the car or did the lady you subsequently married drive it?

A. She drove it.

Q. Had you been waited on by Dr. Fenlon before? A. No, I hadn't seen him.

Q. I mean, at any time, had he been your Doctor? A. Oh, no, never before that.

Q. Well, you got up there, and what service did he render you, if any?

A. Well, he looked me over and changed the

(Testimony of George H. Graham.)

thing on my eye and told me to go back to bed. He says, "You ought to go up to the hospital."

Q. "You ought to go to the hospital." And so you drove back, or rather the lady drove you back then immediately, I assume, to Searchlight? [105]

A. That afternoon.

Q. That afternoon. Then what went on from there with reference to your ability to get around and your medical attention?

A. Oh, I stayed in bed most of the time, and then I had a big easy chair; I would go out in the dining room and sit in that. And I stayed there at the house until along about the 16th. I got a wire from Mr. Stuppi, the trainmaster, to come in and attend an investigation, and I received that wire along about the 10th.

Q. Yes. Now up to that time, had you again revisited the doctor at Boulder Creek?

A. No, I didn't see him for several days.

Q. Yes?

A. But he come to Searchlight. He owned the house where I was living in there. I rented it from him.

Q. Well, he waited on you from the 9th to the time you received the telegram to go in to Needles?

A. Well, the next day, I got the telegram.

Q. Well, did you go to Needles?

A. I was in Boulder City. The next day was the 10th, and I got the telegram on that date.

Q. Did you go?

A. No, I answered and told Stuppi, the train-

(Testimony of George H. Graham.)

master, that I would get in there when I was able to travel.

Q. When did that ability enable you to go to Needles for the [106] investigation?

A. Well, I managed to get in there on the 16th.

Q. And from the time you saw the Doctor on the 9th at Boulder Creek, had he waited on you up to the time you went to Needles on the 16th of July?

A. No, he hadn't.

Q. He hadn't? A. No, I don't think so.

Q. And how were you feeling during that period?

A. Pretty bad.

Q. Well, what do you mean? Where was the hurt?

A. Well, the pain was in my hip and my back was hurting me rather severe.

Q. Well, did you go to Needles then in response to the telegram?

A. I went down there, and I went to the train-master's office and asked him if he wanted to conduct that investigation, that I was there. I told him that otherwise I would go back home.

Q. All right. And you were driven down by this lady by automobile?

A. That's right.

Q. Did the investigation go on that day?

A. Well, I think that day, but I can't tell you the hour. I don't remember the hour.

Q. Well, it went on that day? [107]

A. Yes.

Q. How long were you at Needles that day?

A. All day.

Q. Did you go to the hospital to receive any at-

(Testimony of George H. Graham.)

tention at the Santa Fe Hospital Association?

A. I don't remember whether I did or not, that day or not.

Q. You don't remember.

Q. (By Mr. Baraty): Was it suggested to you that you should visit the Emergency Hospital at Needles, by anybody in the company, on the 16th of July? A. I don't remember.

Q. Well, you did go to the Emergency Hospital there, didn't you, at Needles on the 17th of July?

A. Around, close around that time I did, but I don't remember the dates. [108]

Q. And who waited on you that day?

A. Well, the day I went into the hospital?

Q. That's right.

A. I think it was Dr. Price.

Q. Dr. Price. And you knew Dr. Price, did you not? A. No, I never met him before.

Q. Well, hadn't he waited on you in April of 1945, when you had a laceration on your upper lip, caused by being struck by a door in a caboose?

A. Well, some doctor took a stitch in my lip, but I don't remember whether it was Dr. Price or who did it; I don't recollect. That is too far back for me to remember and be exact about it.

Q. Well, that was only a few months before July of '45?

A. Well, I remember some doctor stitching my lip up.

Q. Well, Dr. Price took care of you then on the 17th and advised some heat lamp treatments,

(Testimony of George H. Graham.)

and that was all? A. He what?

Q. Some lamp, heat lamp treatments, did he?

A. I don't know whether he gave me any lamp treatments there or not.

Q. Did he advise the application of heat?

A. He may have; I don't remember.

Q. You don't. Well, you weren't put to bed there to remain? A. No. [109]

Q. And where did you go? You know better than I do. Where did you go?

A. I returned to Searchlight after that visit to Needles.

Q. The lady drove you back to Searchlight?

A. (Shook head in the affirmative.)

Q. And it was more comfortable up there than in your place in Needles, was it?

A. Well, the difference between—almost thirty-five hundred feet.

Q. What?

A. It was a difference of about thirty-five hundred feet; it is cool up there.

Q. Oh, you mean elevation? A. Elevation.

Q. Yes, I see. Now did you drive the car back to Searchlight? A. No, she drove it.

Q. The lady drove the car. Now what was the next thing you did with reference to paying attention to your hurts?

A. Well, I saw Dr. Fenlon, I think, sometime in between there, because he came down there to Searchlight, and then in early August, I saw Dr. Holtz again, in Needles.

Q. Well now, let's see. When did you see Dr. Fenlon when he came to Searchlight?

(Testimony of George H. Graham.)

A. Well, that was in between; I visited Needles in, I would say, maybe the 24th, 25th or 26th of July—along in there [110]—I can't be positive of it.

Q. He didn't come there to call on you for treatment?

A. Not personally; he owned that house, and he has property there.

Q. Yes, and he just happened to be passing by? And what did he do for you, sir?

A. Well, he just looked me over again. He said, "You ought to go to the Hospital and get a good checking over."

Q. And he again advised you that you should go to the hospital? A. He did.

Q. And he knew you were a Santa Fe Employee and that you belonged to the Hospital Association?

A. He knew that.

Q. And so did he prescribe anything for you—Dr. Fenlon—at that time?

A. No, he gave me some pills of some kind, pain pills, as he called them.

Q. Did they do any good?

A. Well, I can't say they did.

Q. I see. You didn't take his advice and go to a hospital?

A. I didn't feel like making that trip into Los Angeles. I didn't want to go into the Santa Fe Hospital, because I had an unpleasant—

The Court: Well, you answered the question. I think we will save time if you don't volunteer these answers. [111]

(Testimony of George H. Graham.)

The Witness: Okeh.

The Court: Just answer the question. Counsel, ask him a simple question: "You didn't go to the hospital at that time?"

The Witness: I didn't go to the hospital at that time.

The Court: Ask the next question.

Q. (By Mr. Baraty): Mr. Graham, you didn't have any discussion with Dr. Price when you saw him on the 17th, did you? A. No.

Q. Well then, when again did you seek medical attention after seeing Dr. Fenlon in Searchlight?

A. Well, I saw Dr. Holtz in early August.

Q. Dr. Holtz? A. Holtz.

Q. And is he another doctor connected with the hospital association at Needles?

A. He was a new doctor there. It was the first time I had ever seen him.

Q. And what did you tell him was your—or what were your hurts there when you went in on that day?

A. Well, the same ones I had; severe pains in my back and hip, and my head was still pretty sore.

Q. Did he advise that you go to the General Hospital of the Association at Los Angeles?

A. He did. [112]

Q. And did you go there?

A. Not right then, no.

Q. What date was that, was it the 29th of July or was it the 7th of August, 1945, when you saw

(Testimony of George H. Graham.)

Holtz?

A. I can't tell you the dates. I just don't know. I don't remember.

Q. Well, you didn't go right then?

A. No, I didn't.

Q. Why not?

A. Because I didn't feel like going.

Q. Were you in pain?

A. I was in severe pain.

Q. At that time where was it?

A. In my back and hip.

Q. How about your head?

A. That was plenty sore, aching.

Q. And what did you do after Dr. Holtz directed you to the hospital in Los Angeles, further, about medically taking care of yourself?

A. Well, I think I returned to Searchlight, and then on the 10th, I believe I came in and asked for a pass in to Los Angeles.

Q. You were driven back—were you driven back in the automobile, or did you drive it back yourself?

A. I think I drove it back myself that time.

Q. In other words, when you came to see Dr. Holtz, you drove yourself from Searchlight, you saw the doctor, you got in your machine and drove back to Searchlight?

A. Searchlight.

Q. You doing the driving?

A. Well, I think she was with me when I saw Dr. Holtz.

Q. Well now, we are talking about the lady be-

(Testimony of George H. Graham.)

ing with you; I am asking you who did the driving on that trip.

A. Well, when I came in to go into the hospital, I brought that car in myself.

Q. Yes? A. I left it in Needles.

Q. We are not talking about the same thing. I am asking you about the trip you made when you saw Dr. Holtz and did not take his advice to go to Los Angeles, but went back to Searchlight. I am asking you on that trip, sir, did you drive the automobile?

A. After I saw Dr. Holtz, no, I am pretty sure she was with me.

Q. You think the lady drove; did the lady drive the automobile in that trip?

A. She always drives when I am with her.

Q. I see. So she drove you back? I always do it the other way, but that is the way you did it; all right. When was there next given attention to you for medical treatment? [114] Now you are back in Searchlight.

A. Well, I got a pass and went into Los Angeles on the 10th, I believe, of August.

Q. All right. Now to get a pass to go into Los Angeles, you had to drive to Needles?

A. That's right.

Q. And that time you drove the automobile yourself? A. That's right.

Q. All alone. And you came through to Needles——

The Court: Well, haven't you covered it, Mr.

(Testimony of George H. Graham.)

Baraty, without repeating it so many times?

Q. (By Mr. Baraty): Who did you get the pass from?

The Court: He got a pass and went from there to Los Angeles, so let's go on from there.

Mr. Baraty: You got a train and went to Los Angeles? A. Yes.

Q. Did you go to the hospital?

A. I went out there and didn't and couldn't be admitted.

Q. And you told us yesterday you had to wait three or four days because of the conjection?

A. That's right, that's right.

Q. Finally you got in the hospital, and under whose care were you?

A. Well, Dr. Morrison was the chief surgeon.

Q. And did they take X-rays or what did they do for you [115] generally?

A. Well, they didn't do anything for me generally, just laid some boards out there with a pad on it and told me to lay down on that.

Q. And how long did you stay there?

A. Well, I was in the hospital ten days.

Q. Ten days in Los Angeles?

A. That's right.

Q. And did you get better when you were there?

A. I couldn't see any improvement.

Q. Did the doctors discharge?

A. No, I asked them to give me my clothes, that I wanted to go home. I couldn't stand it down there.

Q. You left? A. I left.

(Testimony of George H. Graham.)

Q. And how did you get back home, or to Needles?

A. Oh, I think I went back on Number 4.

Q. On your pass? A. On my pass.

Q. I see, on your pass. And at Needles, then, what did you do, if anything, to take care of yourself? A. I went right on to Searchlight.

Q. You got in your automobile that was there?

A. No, I got a taxi downtown, and he took me over home there, and then I got the car and then drove on to Searchlight. [116]

Q. Well, you got the car, you got your automobile at——? A. At my house.

Q. At your house.

The Court: He said he got his automobile, got in it and drove it back to Searchlight. Now that has been answered already.

Q. (By Mr. Baraty): Now what did you do when you got to Searchlight, to take care of yourself?

A. I just hung right around pretty close to the house and stayed in bed when I felt bad and got up when I could, and done the best I could.

Q. When did you see a doctor next?

A. Well, I seen Dr. Fenlon two or three times, maybe four times, between then and the 19th of September.

Q. At Searchlight or at his other place at Boulder City?

A. Well, I went to Boulder City once and seen him, and I think the rest of the time we were in Searchlight.

(Testimony of George H. Graham.)

Q. Well, when did you stop having the attention or seeing Dr. Fenlon?

A. Oh, I don't know. I have never stopped, outside of the last, since last October or last November, and I give up his house in Searchlight and moved out onto one of my claims there, and that is where I live. I don't get to see him much.

Q. Well, did you again come to the Santa Fe Hospital Association for treatment? [117]

A. In December of '45, I did.

Q. In December of '45. You came into Los Angeles?

A. I went out there on December the 10th and was admitted to the hospital.

The Court: You have answered; you went out there December 10th.

The Witness: That's right.

Q. (By Mr. Baraty): Did you go to the hospital in Los Angeles before December 10, 1945, outside of the trip you made out there in August?

A. In August.

Q. Was it in August you went down there?

A. I was in the Hospital in August.

Q. And you stayed ten days there?

A. Ten days.

Q. Did you go back again between then and December?

A. No; oh, I believe I was out there one time to see Dr. Morrison, and that is what I had to do that to go back to work.

Q. Yes. Now didn't you go back to Los Angeles

(Testimony of George H. Graham.)

to obtain a release from the hospital so that you could go back to work? A. Yes.

Q. And you obtained that release that was put in evidence here yesterday, known here as Exhibit, Plaintiff's Exhibit 1, on the 18th of September, 1945? Your counsel produced this yesterday (handing to witness). I have a carbon copy of it. [118]

A. It was the 19th.

Q. I am very sorry, sir; I was looking at the date of the document. We are one date apart. Now you sought this release to go back to work; you wanted it?

A. I couldn't go back to work without it.

Q. That is the way you interpreted the rule?

A. That's right.

Q. Well, didn't you know that that was not the proper interpretation of the rule?

Mr. Emmons: I will object to that on the ground it is leading and suggestive.

The Court: Overruled.

Mr. Emmons: Well, I will withdraw my objection.

Mr. Baraty: I will withdraw the question for the time being, your Honor.

Q. (By Mr. Baraty): The first thing that is necessary is a release from the doctor, isn't it, before you can get back on the job again?

A. That's right.

Q. That was what you have got here—that is in evidence? A. That's right.

Q. On the 19th—it was dated the 15th of Sep-

(Testimony of George H. Graham.)

tember, 1945, and it authorized, "Qualified for regular duty, 6:30 a.m. 9/19/45. W. A. Morrison, Surgeon." Now with that in your possession, what did you do with reference to seeking your [119] job back again?

A. Well, when I obtained that release,—

The Court: Well, can't you answer that simply? Did you go and get your job?

The Witness: No, I didn't.

Q. (By Mr. Baraty): Did you make an effort to get your job?

A. No, there was nothing I could hold.

Q. What do you mean by that?

A. Well, there were no vacancies or nothing on any run, and I put a bid in and caught 2nd 23 into Los Angeles, caught that run.

Q. Well, with that release in your hand from the doctor, you made an effort then to get this job?

A. I did.

Q. And you found a job?

A. He told me not to attempt any freight work, but to take passenger work only.

Q. And didn't the doctor tell you that for a short period of time he thought you should take passenger duty?

A. He told me that I should go on a passenger job and take it easy, and not to extend myself too much, just to take it easy.

Q. How did you feel physically when the doctor gave you this medical release?

A. I didn't feel good at all. [120]

(Testimony of George H. Graham.)

Q. Well, how did you feel? Where were your hurts, if any?

A. Still bad; I was all shook up, severe pain through my back. I couldn't hardly move around at all, but he says, "We need men, the war is on yet."

Q. I see.

A. "Help us out, go back to work if you can get around at all."

Q. And so what day did you go out on a passenger run?

A. Well, it was after, maybe the first or second of October.

Q. If I tell you that you went out on September 30, 1945, on 2-2-3 with Conductor Dresser, would you say that that was right or wrong?

A. Well, that may be correct, because I am not sure. I haven't got my time card or any time slips.

The Court: Let's not argue about the 30th of September or October 1st.

Mr. Baraty: Well, your Honor, that will have some bearing; that will be material. I am not quibbling about one day.

Mr. Smith: The release was signed on October 1st.

The Court: Oh, I see. All right.

Mr. Baraty: May I have that last read, your Honor.

(Record read.)

Q. (By Mr. Baraty): Well now, you have heard us discuss this matter; does that refresh your memory, that you went out on 2-2-3 under Dresser?

(Testimony of George H. Graham.)

Mr. Emmons: I submit that has been asked and answered.

A. I don't remember who the conductor was.

The Court: Well, do you dispute the fact that you went out as the records show?

The Witness: Well, I will accept that. I just don't remember, Judge.

Mr. Baraty: All right.

Q. (By Mr. Baraty): Now then, after you got the doctor's release—I will withdraw that. At the time that you got the doctor's release, either before or afterwards, had you placed any claim against the company for any reimbursement for the injuries that you sustained? A. No.

Q. Didn't you have an attorney in Los Angeles by the name of Emmett A. Tompkins, to whom you had given your claim, placed your claim in charge, because of this accident that happened on the 6th of July, 1945?

A. I didn't authorize Mr. Tompkins to do anything for me.

Q. Well, you knew Mr. Tompkins?

A. I knew him, yes.

Q. In fact, he was then handling another action for you against the Santa Fe? A. He was not.

Q. On September 18, 1945, the day you obtained your medical release from Dr. Morrison, didn't you see Attorney Emmet A. [122] Tompkins concerning this claim against the Santa Fe?

A. I met him over at the Stowell Hotel.

Q. And didn't you authorize him to inform the Santa Fe that he represented you?

(Testimony of George H. Graham.)

A. No, I didn't.

Q. I will show you a——

Mr. Emmons: May I see it?

Mr. Baraty: Yes, excuse me.

(Handing to Mr. Emmons.)

Q. (By Mr. Baraty): I will show you a document that I have just shown to your attorney, Mr. Emmons, and ask you to just read that over to yourself and see if that may refresh your memory (handing to witness). A. Well——

The Court: He hasn't asked you a question yet.

Q. (By Mr. Baraty): Does that refresh your memory?

A. That refreshes my memory, yes.

Q. Now I will ask you another question.

A. But he wasn't authorized to handle it.

Q. I will ask you a question.

A. Okeh.

Q. Did you authorize Mr. Emmett A. Tompkins to address a letter to the Santa Fe Railroad to the effect that he was representing you in this claim?

A. No. [123]

Mr. Emmons: If your Honor please, I will submit that the letter itself is the best evidence, and it does not say that this attorney is authorized to represent Mr. Graham in this case.

The Court: Well, the question is proper: I will overrule the objection. The question was whether he authorized the lawyer to do it. You may answer.

A. No, I didn't authorize him.

Q. (By Mr. Baraty): I see. Now——

Mr. Baraty: I would like to have this letter

(Testimony of George H. Graham.)

marked as the defendant's exhibit for identification next in order.

The Clerk: Exhibit A for identification.

(Letter referred to above was then marked Defendant's Exhibit A for identification.)

Mr. Baraty: Now what next, if anything, did you do yourself, personally, toward making an adjustment of the claim?

A. I went to Mr. Lewis.

Q. Mr. Evan Lewis? A. In Needles.

Q. At Needles. And what is his capacity?

A. Claim Agent.

Q. At Needles. You knew him?

A. I had met him.

Q. And you went to his office at the station building, did you? [124] A. I did.

Q. What was that? A. I did.

Q. For what purpose?

A. Well, to see what kind of a settlement we could make.

Q. I see. And what was the conversation you had with him?

A. Well, he offered me a settlement which was fair.

Q. He offered you a settlement?

A. Yes, and the Los Angeles Office wanted to settle it in there, so some way or another—I don't know why.

Q. Well, before seeing Mr. Lewis, did you see anybody else in the claims department?

A. Simms.

Q. You say Simms; and he was an assistant

(Testimony of George H. Graham.)

claims adjuster in Los Angeles, in the Los Angeles Office? A. That's right.

Q. Didn't you go to see Mr. Simms the same day that you got the release from Dr. Morrison?

A. No.

Q. What date?

A. Oh, yes, I did too. When I got my first release on the 24th of August and left the hospital, I went down town and I did go up and see Simms.

Q. That is the time you asked the doctors, that you wanted to walk out?

A. I wanted to go home. [125]

Q. In August. And you went down to see Simms at the Los Angeles office?

A. He called me.

Q. Mr. Simms called you?

A. Yes, he did.

Q. Where did he call you?

A. Out at the hospital.

Q. And you went to the office all by yourself?

A. I called a taxi, I believe, and I went downtown and I went in the Santa Fe Building and asked what he wanted with me. He called me and I responded.

Q. And he told you he wanted to discuss with you the possibility of adjusting your claim?

A. That's right.

Q. And nothing came of that? A. No.

Q. So then you are back in Needles, and you saw Mr. Evan Lewis? A. Way later on.

Q. About when, sir?

A. Well, it was—oh, I would say, around the

(Testimony of George H. Graham.)

25th or something like that, of September.

Q. About the 25th?

A. Maybe it would be later, or maybe a day or two earlier.

Q. The 25th of September? [126]

A. Oh, along about that time; I don't know.

Q. And what did your conversation with Mr. Lewis concern?

A. Oh, I just told him I would like to make a settlement and get back to work.

Q. And did you discuss the amount?

A. No, I think he made me a flat offer.

Q. Of \$1050?

A. No, a little bit more than that.

Q. How much?

A. Well, I think he offered \$1200 or \$1300, something like that, and the Los Angeles office wouldn't accept it, from what he told me.

Q. And then did you come to a figure with him?

A. No.

Q. Didn't you get to the point that Mr. Simms—Mr. Lewis, rather, was preparing a release for your signature in the sum of \$1050?

A. Well, I think Mr. Lewis told me I would have to go in to Los Angeles to settle that.

Q. Didn't you come to a point where you told Mr. Lewis you would take \$1050 and he was preparing a release?

A. I don't remember. Exactly, I couldn't say; I know we came to an agreement with Mr. Hitchcock, I think, wanted to talk to me. I don't know the general conversation.

(Testimony of George H. Graham.)

Q. Do you recall while Mr. Lewis was preparing this release, [127] that you demanded of him that he strike out any reference to releasing the engineer from a claim that you might have against the engineer for damages?

A. I don't remember that.

Q. And don't you remember that you insisted that the words, "its agents and employees" be excluded from the release?

A. I don't remember just that.

Q. I am going to show you a document and ask you if you have ever seen this document before, and drawing your particular attention to the words that are crossed out there. (Indicating and handing to witness.)

A. Well, I might have seen this before. I don't recall off-hand.

Q. Don't you recall that it was at the time you were discussing the settlement with Mr. Lewis at Needles that this document was prepared?

A. No, I can't say that I do recall it.

Q. Do you remember striking out the words that are stricken out there? (Indicating.)

A. What words do you mean?

Q. Right here. (Indicating.) A. Oh.

Q. "Its agents and employees"? I think those are the words. A. I didn't strike it out.

Q. You didn't strike that out yourself? [128]

A. I don't think so.

Q. You don't think so.

A. In fact I know I didn't, to my knowledge.

Q. What is your best memory?

(Testimony of George H. Graham.)

A. I don't remember it.

Q. Do you remember having a discussion with Lewis and saying that you weren't going to let this engineer get away with it, that you were going to have a suit against him?

A. I don't remember that.

Q. And Lewis told you that this release couldn't be changed, that it either had to be taken or not signed?

A. I don't remember that.

Mr. Baraty: I would like to offer this as defendant's exhibit next in order for identification.

Mr. Emmons: For identification—that is all right.

Mr. Baraty: That is all.

The Clerk: Exhibit B for Identification.

* * * *

[129]

Mr. Emmons: I am sorry to have delayed you, your Honor. At this time, if your Honor please, I would like to call Dr. Niemand out of order, if we may.

Mr. Baraty: We have no objection.

The Court: Very well, put him on.

Mr. Emmons: Dr. Niemand, take the stand, please.

FREDERICK G. NIEMAND,
called on behalf of the plaintiff, sworn.

The Clerk: Q. Will you state your name for the Court and the Jury?

A. Frederick G. Niemand.

Direct Examination

Mr. Emmons: Q. Now, Dr. Niemand, you are

(Testimony of F. G. Niemand.)

a physician and surgeon, practicing here in California, are you? A. Yes, I am.

Q. And your offices are at 450 Sutter Street, here in San Francisco? A. That's right.

Q. And you have a license to practice medicine in California? A. Yes, sir.

Q. And are you licensed by any other board?

A. Well, the National Board of Medical Examiners.

Q. I see. Now how long have you been practicing here? A. 1929.

Q. Are you on the staff of any hospital here in San Francisco?

A. I have been on the staff of the San Francisco Hospital. I am on the staff of the St. Francis Hospital now.

Q. I see. Have you ever taught at any of the medical schools in the Bay Area?

A. Stanford Medical School.

Q. And in the course of your practice, doctor, the practice of your profession, do you treat and examine cases dealing in personal injuries, upon injuries? A. Yes, I do.

Q. And could you estimate approximately how many such cases you have examined in your practice during the course of your practice?

A. That is pretty hard to say. I was in the emergency practice, and we used to see a great many cases of all kinds, and of course naturally, in the practice of medicine, you see all sorts of traumatic injuries. It would be pretty hard for me to say how many I have seen.

(Testimony of F. G. Niemand.)

Q. Now during the course of your practice with the Emergency Hospitals, did you have occasion to X-ray those injuries too?

A. Well, what I would do, I myself might see injuries of various kinds, and then being on the staff at the County, [131] I would follow them up to see what happened to them. Of course it was not in my service, but I would do that on my own.

Q. Now in your practice, have you had occasion to examine and read X-ray pictures of various parts of the body of your patients?

A. That's right.

Q. And how frequently would that practice be?

A. Oh, every day.

Q. Practically every day? A. Every day.

Q. I see. And for what purpose would you take or have these X-rays taken?

A. Oh, for any purpose that we would use the X-ray as a diagnostic medium in determining whether there has been a dissolution of the continuity of a bone, or whatever it might be, or a probable traumatic injury. That means a fracture, in other words. The dissolution of continuity is the way we speak of a fracture or a break of the bone; a fracture and a break are the same thing.

Q. I see. Now will you explain to me and to the members of the jury the location of the cervical and the thoracic and lumbar vertebrae?

A. Yes. There are three different types of vertebrae; there are the individual bones of the backbone, and the three divisions of these are the cervical vertebrae, which are in the [132] neck,

(Testimony of F. G. Niemand.)

beginning at the base of the skull; going downward to, we will say, about midway, or we will say at the upper end of the scapula—from there on, we have the thoracic vertebrae, which is down to about, we will say, where the ribs end, as they insert into the back; and then we have the lumbar vertebrae, which go on from there. Then finally, the lumbar vertebrae fuse into the sacrum, which is the bottom bone, ending with a little tail-like appendage, which we call the tail-bone, which is called the coccyx medically.

Q. Now do you, Mr. George H. Graham, who is the plaintiff in this action? A. Yes, I do.

Q. Do you know him personally or professionally? A. Professionally.

Q. And when did you first see Mr. Graham?

A. September 18, 1946.

Q. Do you recall what his complaints were at that time?

A. Well, his complaints have been the same since—I mean, just to clarify the situation, his complaints have been the same from that day until this, with increasing severity over the period of time. And he complained at that time of this difficulty in his lower back, his inability to extend or flex his back. In other words, flexion meaning to bend his back forward, (Indicating) or to extend his back means to straighten it out, putting your head back so. (Indicating.) He had a [133] definite limitation of motion both in flexion and in extension. He also had limitation in sidewise motion of

(Testimony of F. G. Niemand.)

the back, to the left and to the right, and in rotatory function of the back. Those are the standard motions that we put patients through in order to determine how much limitation of motion may be in existence in the back, and what degree of severity of injury possibly might be causing that disability.

Q. Now how many times have you seen Mr. Graham professionally?

A. Oh, I would say about ten times.

Q. As a result of your examination of Mr. Graham, did you have X-rays taken of his back?

A. Yes, I did.

Q. And I will show you here—

A. I really haven't given you a very good answer on that last question as far as the total amount of difficulty he had in his back and, I might say, I hadn't quite finished it.

Q. Well, you continue, then, doctor; do you want the question read by the reporter?

A. Well, just—what did he ask me?

The Court: He wanted to know what the plaintiff's complaints were.

A. (Continuing): He complained of pain in his back, and running down his leg. That is enough, then, in that regard. The limitation of motion, I think I gave that already.

Mr. Emmons: Q. Now I will give you these X-rays, doctor, [134] which are from your office and hand them to you and let you use them in your explanation, and I will ask you what, if anything, you found as a result of those X-rays in the nature of any disability or injury to Mr. Graham's back (Handing to witness)?

(Testimony of F. G. Niemand.)

A. Well, the first ones taken in our office are a lateral view of the man's back. Of course, we get better pictures in this sometimes, but our difficulty here is that the man is so big; that is a difficulty with the X-rays, and that is the difficulty with the treatment. Here we have our lumbar vertebrae, the 5th, 4th, 3rd, and up the line. In this distance—I don't think it shows as well in this picture as the other one. We will take another one, if you don't mind. That shows it better. Now this was taken in '48. That '46 is not as clear as the '48 one. We are seeing more. Now if you will notice the delineation of the vertebrae here, you will see that is very clear cut. I mean, the edges, the lines of it are very definite, whereas we see here in the 5th one, this bulging out. Then we have this bulging out here, and we have a lot of material in here (Indicating). You can see that it comes out here.

Now each one of the vertebrae are held up, or we will say, separated from each other, by a little doughnut, equivalent to the hole, is a little fluid. Now the medical name of the fluid ligamenta flava, we don't care about. In other words, in describing it, it is a little doughnut of cartilaginous [135] material which separates one vertebra from the other. Now with any type of flexion, as I pointed out to you, where you go down this way, (Indicating) a so-called "jackknife" fall—for instance, I remember a case, just to explain it, in which a fireman coming down a pole, he grabbed the pole

(Testimony of F. G. Niemand.)

and jumped down and hit too hard when he hit below, and jackknifed. He developed a typical thing which we have here, which is a compression of this little doughnut, which you can't see, because the X-rays only show lights and shadows. They show the bones because there is such a contrast in the difference between the bone and soft tissue. Now with any type of compression, this little doughnut part is broken or severed, and that fluid which the one vertebra rests upon, one upon the other all the way up the chain leaks out. Well, as a result of that, because of the excessive weight, because our spinal column carries all of our weight, gradually what happens is a breaking down of this disk, called the intervertebral disk. It gradually breaks down until you begin to see it shoot up like this. If we did what we call a "mylogram" on him, which is something that should be done when it comes time to repair the disability, that may show a part of this disk sticking out into the canal, into the spinal canal. Now this is the thing that he is having his back ache from. (Indicating). It is breaking down; it is the breaking down or degeneration of it, which will increase, of course, and which has, as we see, caused some arthritis to develop in [136] this area. Now let me see if we can show it by another picture. No, that is not as good. Here, that shows it very well. Again we see the protrusion. This is the effort of nature to stop the breaking down. Nature will sometimes make a bridge of arthritis across here so that the continual motion of this vertebra down,

(Testimony of F. G. Niemand.)

pressing down, pushing down by even the slightest motion of the back, increase that all the time. So you will find these people don't move around very much; they keep their backs still, and it is quite evident why they do. The fact is that the more they move, the more they are breaking down the disk, the more they are causing pressure on the nerve. Now, for example, in his case, he has definite changes in the left sciatic nerve, because the sciatic nerves which come out of here, it has been pinched and will be increasingly pinched until we do something about that—which is the removal of the disk and fusion of the joint. There is no other way you can treat the thing.

Q. I see. What is the date of that X-ray doctor?

A. September, 1946.

Q. Do you have an X-ray of any prior date to that?

A. This is 1948. Here is one taken at Boulder City on February 13, 1946. You can see it is not quite as marked a process. The arthritic process is not quite as marked as before, but the same chewing up process, the lack of delineation or clear cut view that you should see, just as you might see, in here— [137] there you can see where the disk is intact. See how clear that looks through there, and through here. But here, we see that. (Indicating.)

Q. Does that first X-ray show the crushing of the intervertebral disk, as you call it?

A. Yes, they all show that there is something has happened in that joint. Now I don't know, I

.(Testimony of F. G. Niemand.)

can't tell you the dates when that happened. I mean, there is no way of knowing that. I would say that the injury is there, and I know that any trauma he sustained is going to increase the injury, and that is all I can say.

Q. Yes. Now that is your conclusion from the X-rays, doctor? Those are your conclusions from the X-rays?

A. Yes. I mean, he has a fractured, degenerate intervertebral disk, 5th lumbar, and there are evidences of arthritis at that area, which shows that there is localized disability or disease.

Q. Is the arthritic condition due to this trauma?

A. Yes, because you see—

Mr. Baraty: What trauma? That is leading and suggestive.

Mr. Emmons: Q. To trauma. Let me put it this way:—

A. You had better say it again so I will be sure I have the right thing.

Q. Now is this arthritic condition that you find in the picture, is that due to trauma?

A. Well, I would say that he doesn't have any arthritis in any [138] of these other joints. They look clear as a bell, except here, where he has had the trauma—so that my only conclusion is that it's nature, trying to stop the motion in that joint.

Q. I see.

A. Which is nature's method of trying to do the thing we would try to do medically, or surgically, rather.

(Testimony of F. G. Niemand.)

Q. May I have the three X-rays you just mentioned here, Dr. Niemand, the three different dates that you have?

A. Let's see which ones I talked about now. Well, these two should go together. They are both at that time.

Mr. Baraty: There was one in '48, one in September of '46, and one in February of 1946 at Boulder City.

The Witness: These are September '46. That would be it.

Mr. Emmons: Q. Are these both September of '46?

A. No, that would be the middle group. Now these are August of 1948.

The Court: Well, what the attorney wants is the three X-rays.

The Witness: That is what I am trying to get together, Judge. These are the last ones. The first one is the middle one, the first taken are coming up now.

Mr. Emmons: I just wanted the one of the group there, doctor which shows the injury.

A. All those do.

The Court: Yes, but all the attorney wants you to do is to [139] hand him the particular ones that you put on the machine and testified about.

The Witness: All right, they got mixed up. That is number 1.

Mr. Emmons: Q. This is the one you just testified from?

A. Yes, that is the last one I testified from.

(Testimony of F. G. Niemand.)

But that is the first picture taken.

Q. That is the first picture taken, at Boulder City?
A. Yes.

Mr. Emmons: Now, if your Honor please, I would ask that this X-ray picture be admitted in evidence as Plaintiff's exhibit next in order. It is an X-ray dated 2/13/46, taken at Boulder City Hospital, No. 475, George Graham.

Mr. Baraty: I have no objection that those three go in, but I would suggest they be put in in the order that the doctor used them on the machine.

Mr. Emmons: I think that is immaterial.

Mr. Baraty: Well all right, that was just my suggestion.

The Court: Do you have the three of them? Get them together and we will mark them in evidence.

Mr. Emmons: Yes, sir.

The Witness: This August 16, 1948.

Mr. Emmons: This is the X-ray dated August 16, 1948, George H. Graham. We ask that that be admitted in evidence as plaintiff's exhibit next in order. And will you see which of [140] these that you have testified concerning—? Is this the one? Thank you.

We will ask that this X-ray be admitted in evidence as plaintiff's next in order.

The Clerk: To be marked Exhibits 2, 3 and 4, in the order presented to me.

(X-ray films dated 2/13/46, 8/16/48, and 9/19/46, were then received in evidence as Plaintiff's Exhibits Nos. 2, 3, and 4, respectively.)

(Testimony of F. G. Niemand.)

Mr. Emmons: Q. Now, doctor, I would like you to assume the following facts: That on July 6, 1945, two engines were traveling in a direction this way; that they collided forcibly with a caboose which was parked there; that it was in and about 1:30 in the morning; that the caboose, that a man was in the caboose, in the act of climbing from the floor of the caboose up to the cupola; that while he was up there, had ahold of a grabiron, as a result of the collision, he was thrown to the floor; that he landed on his back, left shoulder and left side; that when he was up on his feet again, the engineer of this train, or the engine, reversed the engine and let the rear end of the caboose down to the tracks; that as a result of this release, this man again fell to the ground; that when he was through—

Mr. Baraty: You mean the floor?

Mr. Emmons: Q. (Continuing) To the floor, yes, I am sorry [141] —to the floor of the caboose; when he was through, he complained of an injury to his back. Now could the trauma under such circumstances have caused a crushed vertebral disk?

Mr. Baraty: Well, the objection to that is that the doctor has already testified that he is not in any position to say when this injury happened.

Mr. Emmons: This is a hypothetical question.

Mr. Baraty: That is a hypothetical question. Mr. Graham has testified to a certain of facts, the doctor gives his opinion of the X-rays; it is a matter of conclusion.

(Testimony of F. G. Niemand.)

The Court: Well, I think counsel's question was general; he merely wants to know whether or not the force of the type he mentioned could cause a fracture of the type he mentioned of this nature.

Mr. Baraty: Well, the important question we are to determine here is whether this did it, and has been left out of consideration of distance and all that.

The Court: Yes, but we are not interested in some general situation; what you really want to know is whether a trauma of the nature you have described could be the cause of the condition of the spine which the doctor says is present.

Mr. Emmons: Yes.

A. Now when you say that to me, do you want to know whether it could cause that disk fracture or whether it could cause the symptom? That is two horses of a different color. [142]

Mr. Emmons: Q. Well, first, could it cause the injury you have testified to?

A. Yes, it could.

Q. It could. And could it also cause the symptoms? A. Yes, it could.

Q. Now the injury that you have shown us here as existing in those X-rays, could that have existed prior to the time of this accident?

A. Yes, it could.

Q. It could. Now assume that it did, doctor; would that type of a condition in a man be a disabling one? A. Oh, without question.

Q. Would it be disabling? A. Absolutely.

(Testimony of F. G. Niemand.)

Q. Now are you certain that you have my question in mind, doctor?

A. Well, say it again.

Mr. Emmons: Will you read that question again?

The Court: He is trying to get, he wants you to say, doctor, that if there was a pre-existing condition of that nature, that the condition might not necessarily be disabling.

The Witness: Oh, I didn't understand your question.

Mr. Emmons: Will you read the question back to him please?

(Record read.)

Mr. Emmons: Q: Well, I think your answer is correct there; [143] my question was not correctly framed. This is what I wish to ask you: Would this man have any pre-existing condition which would be disabling prior to the time of this accident?

A. No, not necessarily; he could have a degenerated disk without it necessarily being very disabling. It might not disable him. We could say that he might have—just by tying your shoelace like this, (indicating) and you could fall off onto the floor, like I have had them, and sit on the floor and get a disk fractured. Then it might not bother you for ten years, until some acute thing really starts more of that cracking together of the vertebra (indicating). That is what happened in this case.

Q. Then it is possible that this could have been

(Testimony of F. G. Niemand.)

unknown to Mr. Graham prior to the time of this accident?

A. Well, it was evidently unknown to the Santa Fe when they examined him, or they wouldn't have taken him.

Mr. Baraty: May I ask that that be stricken? It is not responsive. The Santa Fe will take care of that when it gets to it.

The Court: Yes, that answer may go out.

Mr. Emmons: Now, doctor, assume then that a man had this pre-existing condition and this traumatic injury; would it necessarily be a permanent injury?

A. You mean if he had a fractured disk?

Q. Yes. [144]

A. Would it be a permanent injury?

Q. Yes.

A. You mean, in other words, would it go away at some future time without doing anything about it?

Q. Yes. A. No.

Q. In other words, that will exist and continue on?

A. If you have the fracture, the fluid leaks out and degeneration or crushing of the disk begins. When it goes to the point that it starts to impinge upon the nerves, of course you will have pain in the back, meanwhile—then you have trouble. But the process may take several years. It might take quite a long time before that comes along.

Q. Does it get progressively worse?

A. Unless, for example, suppose your arthritis

(Testimony of F. G. Niemand.)

bridge across. Well, that would slow up the process of the thing.

Q. I see.

A. But there is only one way to fix it and to do anything about it, and that is—or to handle it—and that is to surgically take care of it.

Q. I see.

A. That is the accepted treatment today. You see, not very many years ago, we had people who came in with chronic back aches, and we ascribed it to all kinds of things—lumbosacral strain, sacroiliac strain and a lot of them had disks and we [145] didn't know it. We treated them for that for years. We are just finding out about some of these things.

Q. You have to be a specialist in intervertebral disks to see those things? A. No.

Q. Can the average doctor, reading these X-rays, see those? A. Sure.

Q. Now let me ask you this: In your opinion, can this—

A. In San Francisco, I mean, the larger sized cities. I mean, I think they are better, shall we say, trained in traumatic things, possibly than the smaller places.

Q. I see. In your opinion, doctor, can this man expect to recover from the effects of this injury?

A. Oh, yes; well, with surgery, sure.

Q. With surgery. Will it require surgery to relieve the pain and suffering which he has undergone?

A. That is the only treatment that is any good.

(Testimony of F. G. Niemand.)

Q. Now what is your prognosis as to his injury?

A. With surgery it will be good.

Q. With surgery?

A. I mean, if it isn't done, he is just going on and he will get worse, and worse, and worse.

Q. And that is your prognosis?

A. There is no question. I mean, that is without any question. That is the way these things go. You can see why, because it [146] is just going to grind down the disk, and then it will start to grinding down the vertebrae until you do something about it.

Q. Now, doctor, if you received a report from an X-ray technician that the films—

A. You don't receive reports from the X-ray technician, we receive them from an X-ray doctor or roentenologist.

Q. Then I will be corrected on that—from an X-ray doctor, reporting that films of the thoracic and lumbar spine do not show any fracture, dislocation or bony pathology, and that related to Mr. Graham's back after this injury, would say that that was a correct statement?

A. If I received a report just on the cervical and the thoracic vertebrae and it showed nothing?

Q. No, the films—

The Court: Well, that is obvious, counsel, that if he received a report that there was nothing the matter with a man, then received a report that there was nothing the matter with the man. How can he answer that? Or were you asking him to say that if some doctor disagrees with him, he

(Testimony of F. G. Niemand.)

doesn't agree with the doctor that disagreed with him?

Mr. Emmons: Q. Well, assume that that report came in, doctor, that the films of the thoracic and the lumbar spine do not show any fracture, dislocation or bony pathology; assume further that this man was treated by the doctor who requested these X-rays to be taken, and that on a subsequent time, within [147] the last month, he read them for the first time, those X-rays, and examined them and concurred in the report which I have just read to you. Would that be a matter, the injury which we have described here, that doctors could honestly and reasonably differ?

Mr. Baraty: Well, I will object to that as leading and suggestive, asking for the conclusion and opinion of this doctor and to the possible testimony of somebody else.

The Court: I think the objection is good, counsel.

Mr. Emmons: May I have your hospital record?

Mr. Baraty: Yes, sir.

The Court: Mr. Emmons, I made that ruling because I find that is a common practice for lawyers to ask that sort of a question—that if some other doctor holds a contrary view, then “you, doctor, think he is wrong?” Well, those are argumentative questions. Your doctor may testify one way, a doctor on the other side may testify the other way. The jury may resolve that; they will have to decide what testimony they are going to accept. But it becomes argumentative when you ask

(Testimony of F. G. Niemand.)

one doctor whether, if another doctor comes to a certain conclusion, that doctor is wrong.

Mr. Emmons: Q. Well, in your opinion, Dr. Niemand, in examining this man and taking X-rays of his spinal injury, could any doctor who makes a practice of taking X-rays have missed, or diagnosed the particular injury here in question— [148]

Mr. Baraty: We object to this question; it is argumentative, calling for a conclusion, and invading the province of the jury.

The Court: I think the objection is good, counsel. Those are questions that don't add anything to the testimony of a witness. The witness may give his opinion, but it doesn't do any good for him to state that the opinion of someone who doesn't agree with him is incorrect, because that is just his opinion.

Mr. Emmons: Q. Well, let me ask you this, Dr. Niemand: In your opinion, was this condition which exists at the present time in existence the first time you saw this man—was it in existence on August the—? A. 19th, August 19.

Q. Let's see. On August 16, 1945?

A. I don't know then. I didn't—the only time I could say it was in existence is when the first X-rays were taken, in February of 1946, wasn't it?

Q. Yes.

A. If it could be seen in that picture.

Q. It can be seen in that picture?

A. Oh, it is evident in that picture. And I am not a roentenologist either.

Q. Now what is Mr. Graham's present condi-

(Testimony of F. G. Niemand.)

tion in regard to limitation of motion, if any?

A. He has definite limitation of all motions of his lower spine. I mean, in all of the motions that we put him through, as I explained before. And he has muscle spasm and things of that kind, but them that is incidental to the diagnosis.

Q. Did you witness those? A. Oh, yes.

Q. You put him through the tests yourself?

A. That's right.

Mr. Emmons: You may cross-examine.

Cross-Examination

Mr. Baraty: Q. Doctor, this disk involvement that you speak of, if it was caused by trauma, you haven't any idea when that trauma occurred, have you? A. I can't say when it occurred, no.

Q. It could even have occurred during childhood? A. Oh, I don't believe that.

Q. You don't think a boy— A. No.

Q. —playing rough games or football or something like that— A. No.

Q. Wait a moment please.

A. Excuse me.

Q. (Continuing): —playing games of that type could fracture a disk that he would carry through into later life? [150]

A. No, I don't think so. I think that the symptoms of that much of a crushing injury to the disk would have made themselves apparent before that.

Q. But you are not able to say that Mr. Graham was hurt at the time he claims, in this action this is now before this court?

(Testimony of F. G. Niemand.)

A. No, I can't tell you the date of that accident within, we will say, a reasonable time. I mean, I know it wouldn't go back that far. We usually expect these things are going to—well, you take a man particularly with his frame, heavy as he is—you would have sooner evidences of the symptoms of a fractured disk than you would with, say, a man that had a very light frame.

Q. What do you mean by "the degenerative process of the disk and the spine"?

A. Well, it is the idea that one vertebra is on top of the other, and when the fluid which holds the two apart is gone, then the bone against bone (Indicating) crushes the cartilage, which is sort of soft tissue, by the contact, the constant movement of the back, which goes through various motivations. It keeps on crushing, crushing, crushing, until it just degenerates. It brakes up, it smashes, it disintegrates that particular disk.

Q. Well, isn't the degenerative process of the spine something that comes naturally? [151]

A. No, this—

Q. Without a blow or trauma?

A. The degenerative what of the spine?

Q. Process.

A. I don't know what that means.

Q. You don't know what it means?

A. There could be an arthritis, there could be a thousand things under the name "process." That is too general a name.

Q. Well, you pointed out some arthritis on the vertebrae surrounding this disk? A. Uh-huh.

(Testimony of F. G. Niemand.)

Q. The top of the sacrum and the lower, the fifth. What does that indicate? How is that formed, what does it come from? A. I wish I knew.

Q. You don't know?

A. No one knows the causation of arthritis. In this case, all that we have to ascribe it to is the particular injury at that joint, which is what we call a traumatic arthritis, which means an arthritis which develops at that point due to irritation. But the causative process of the typical arthritis, that you see in people, we don't know.

Q. Well, arthritis doesn't develop because of a blow, does it? A. Yes, it can.

Q. It can? [152]

A. Yes, traumatic arthritis. That is a well known fact.

Q. It can. Now tell me the other types that can develop, talking about arthritis?

A. Well, the typical kind that can develop following a blow or an injury to a joint is a well known medical entity, and that is called traumatic arthritis.

Q. Now that is what we have been speaking about. Suppose there isn't any traumatic arthritis; how does arthritis develop?

A. How does it develop?

Q. Yes, how does it come about?

A. It comes about, we might say—we might describe it by the "increasing deposition of bony material at some particular point of irritation," or sometimes without irritation. In other words, the joint's surfaces become thickened, and the motion

(Testimony of F. G. Niemand.)

is impaired, and the musculature of the tendons begins to contract, and then you get a typical deformity of that arthritis, so there is less motion in the joint or in the back, and we have maybe a typical "poker" spine, and that is when we have arthritis all along the spine. But in this picture, as you notice, there isn't any arthritis except at that one point. (Indicating.)

Q. Well, that can come about through natural causes, can't it?

A. Not when it is localized like that. If it was from natural causes, you would see it along the whole lumbar spine. That [153] is traumatic arthritis; it is nature's endeavor to hold that joint from crushing that vertebra.

Q. That is your diagnosis now?

A. Absolutely; yes, sir.

Q. But you are not able to say when the trauma existed or when it was created?

A. No, I couldn't do that. I mean, putting a date on it, like the X-rays have a date. I could say relatively.

Q. Could it have happened ten years before this accident?

A. No, I don't think that long.

Q. Five years?

A. More likely.

Q. More likely five years?

A. Maybe five, I don't know. It is hard to say. It is very difficult to say, because it can come—you have to realize this—from such inconsequential trauma that the patient may not be aware of it until X-rays are taken.

Q. Will you in these three exhibits, if you

(Testimony of F. G. Niemand.)

please, doctor, show me the one that was the earliest one taken, please?

(Handing to witness.)

A. I think this is the one; yes. This is the first one here. It is quite evident in that, as you can see. (Indicating.)

Q. Wait a moment, I will ask you a question.

A. All right.

Q. Now you have now on the film box what is known here as [154] No. 2 in evidence. Now would you please tell us when that X-ray was taken? A. The date is 2/13/46.

Q. 2/36—February 13, 1946? A. Uh-huh.

Q. And where was it taken?

A. Boulder City Hospital.

Q. Was there a report of the roentenologist that took that, that accompanied the picture?

A. Yes, there was.

Q. Have you got it? A. No, I haven't.

Q. You haven't got it with you?

A. No, they reported the same thing, a degenerated disk.

Q. Who is supposed to have taken that?

A. That was taken at Boulder City and reported from the U. S. Marine Hospital, and they reported a degenerated disk.

Q. Now does that, in February of '46, show a calcification there above the sacrum?

A. Yes, here and here, and here. (Indicating.)

Q. To what extent is there calcification there, can you tell?

A. I would say there is moderate calcification.

(Testimony of F. G. Niemand.)

Q. In your opinion, how long prior to the taking of this X-ray film has that calcification existed?

A. It depends; that can't be ascertained, because it depends [155] upon the—nature puts out this material as quickly as it needs it, and that can come very rapidly with a severe injury, and with a man that has the weight this man has, this could make itself appear in relatively quick time.

Q. I was going to say rapidly is a relative term?

A. That's right.

Q. Now just what do you desire for us to understand by your use of the word "rapidly" in connection with the question I have just put?

A. I would say within a few years.

Q. A few years. So that in February of 1946, the calcification that you read on the film that is now in the box, in your opinion, would be a few years duration?

A. Uh-huh, as far as I could ascertain.

Q. And when you say that, you are mindful of the fact, are you, that the injury claimed to have occurred here is alleged to have happened on the 6th of July, 1945?

A. Counsel, the things that you have to realize are that symptoms and pathology are not concomitant. By that I mean that you may have a considerable pathology and very few symptoms and very little pathology, and a great deal of symptoms. In other words, this man could have had such a disability giving him very little trouble until an acute blow (Indicating) which flares it up in a marked degree.

(Testimony of F. G. Niemand.)

Q. Doctor, do I misunderstand you when you say that the [156] calcification on the exhibit now in the shadow box, in your opinion, is of a few years' duration prior to the taking of that X-ray film?

A. Yes.

Q. We understand—that is correct, isn't it?

A. Yes.

Q. I don't misunderstand you, do I?

A. No.

Q. Now I am showing you a film that was taken at the Santa Fe Hospital, the Santa Fe Company hospital at Los Angeles by Dr. McColl, Roy L. Fiedler. "Name, George H. Graham (I think it is, with a number). Age 49. Name of technician—date, 8/16/45," with a signature of a doctor. Oh, yes, Dr. Flamson. Now, this comes from the hospital file of the Santa Fe Hospital Association for Mr. Graham, and I am asking you if you will show us if there is any calcification noted in the disc, the intervertebral disc between the fifth vertebra and the sacrum in this film. Now I may not be putting it on right. If I am not, you know how.

A. No, that's right. Of course, this isn't as good a picture, but of course you can expect that as between Los Angeles and San Francisco. We do much better up here.

Q. Well, that is all right, but it is a good picture, as good a picture as taken at Boulder Creek?

A. Well, you can see the same calcification in here. It is not [157] as evident, but you can see it, there and there. The same calcification goes across there.

(Testimony of F. G. Niemand.)

Q. So the calcification—

A. Trauma could be there, and probably was there at that time.

Q. In other words, there was trauma when this picture was taken in 1945, August 6, 1945, and are you prepared to say that that calcification indicated in the film there was at least two years' duration at that time?

A. It doesn't look as marked there as it does in our pictures. Now, that could possibly be from our better X-rays, it could be because of difference in time. It isn't as good, it really isn't. You can see that yourself if you compare it. It just isn't as good a picture.

Q. There is no question but that there is an injured disc in that?

A. Yes, you can see the same thing in here. You can see the clearness of that one, and you can see the lack of clearness there.

Q. And your testimony, of course, is that you are not able to say when the—

A. No, nobody could tell you that.

Q. When the trouble or the blow caused that narrowing? A. Uh-uh (negative).

Q. Well, of course, before I ask another question—

Mr. Baraty: I would like to offer this in evidence as [158] Defendant's next in order.

The Clerk: Exhibit C.

Mr. Emmons: No objection.

(X-ray film dated 8/16/45 referred to was received in evidence as Defendant's Exhibit C.)

(Testimony of F. G. Niemand.)

Mr. Baraty: I don't want to mix these up. Either one of the three you were using.

The Witness: He has it there.

Mr. Baraty: Q. Is this it?

A. Yes. One difference is, you see these are dealing with a rotating and odd tube, which makes a much better picture of the back than those that were taken at a prior time. You see, it is different.

Of course, when you go up to the fourth and third and second, why, there is a nice, pretty picture there, and you can see perfectly. That is straight up and down, practically.

Q. But when you get down to any man's sacrum, why it starts to bend inward again, doesn't it? A. Yes. You mean, the fact—

Q. You don't have the perfect formation you have of the top of the fourth and third and second.

A. Well, no, the reason you have the perfect formation—but what you have to contend with is the fact that you have the ilium here, that you are shooting through both ilii to get that picture on that plate. In other words, when the man is [159] standing this way, you have got this bone in the road, this ilium that comes up here, see, and you have got one over here. So when you are shooting this here, you have got both ilii, which are evidenced by this, to go through in order to get the picture of that. That is why it doesn't look as nice. But I am not talking about that. Now, the X-ray men, of course they have tremendous ability to see these things—much better than I have, or anybody.

(Testimony of F. G. Niemand.)

has, because that is all they do. But it is quite evident to me here, that you have got something going on in that joint by the fact that process is sticking out there, and by the narrowing of this angle. Now, that angle should be—do you mind if I make a mark on there to show you what it ought to be?

Q. That is all right with me.

A. I mean, this is just tentative, but just to give you an idea, in other words, we should have something like that on here as a distance between them (marking X-ray). In other words, you should have a distance like that between the sacrum. It shouldn't be constructed like it is, it should be a definite gap there.

Q. And it is still bending forward as it gets way down into the sacrum, isn't it, and narrower?

A. What do you mean? It is still bending forward?

Q. Well, you get off the perpendicular that you have between the fourth and fifth and the second?

A. You mean the fact that the sacrum begins to turn inward?

Q. Yes, sir.

A. Yes, the sacrum begins to turn in.

Q. Now, I will ask you a little bit from down here. Do you know the age, or did Mr. Graham give you his age?

A. Yes, he gave it to me. What was it—48 or 49? Something like that. I have forgotten exactly.

Q. And does that age have any tendency to

(Testimony of F. G. Niemand.)

make stiffer the lower vertebrae there in any of us humans?

A. No, not in his case, because he has got some beautiful vertebrae above here. I mean, I hope mine are as good. I mean, they are really good. He has no arthritis, no arthritic changes otherwheres. Now, I haven't taken any pictures of his hands, but he doesn't evidence any arthritis except at that point, and the X-ray man concurs with that same idea, that the spine is—

Q. Well, as an ordinary thing, with the average man who gets into the fifties—

A. I would expect more than that.

Q. You would expect more than that in the average man. Before I forget it, have you the reports of the two that were offered in evidence here, the reports of the roentenologist that accompanied Exhibits 3 and 4?

A. Here is the last one. Well, there is no report with that. That was it. [161]

Q. Are these taken in Pines' and Williams' office? A. Yes, Pines and Williams.

Q. There was no report accompanying it?

A. Yes, there was, but they were not in evidence.

Q. Have you got it with you?

A. Yes, I have got a report here.

Q. But have you got it there?

A. That is not in evidence, though.

Q. Well, maybe I will put it in evidence.

A. O.K.

(Testimony of F. G. Niemand.)

Q. Now, do you agree with this report that says there is no evidence of fracture?

A. Of the vertebrae, yes.

Q. I am reading that correctly from the report?

A. Yes.

Q. There is no evidence of fracture?

A. He means of the vertebra.

Q. With the insertion of what you say, the rest coincides with your opinion? A. Oh, yes.

Q. The films?

A. Yes, I have no fault with that at all.

Q. The lumbosacral disc space is narrowed to the same degree as seen in the examination of 9/19/46, and previous films made outside on 2/14/46; do you agree with that diagnosis? [162]

A. Yes, that is all right.

Q. There is a localized spur formation around the joint. Do you agree with that?

A. Uh-huh (affirmative).

Q. "Alignment of the spine is normal." Do you agree with that? A. Uh-uh (negative).

Q. "The abdominal aorta shows scattered calcification?" A. Uh-huh (affirmative).

Q. Do you agree with that?

A. Uh-huh (negative).

Q. What does that mean?

A. Well, a man like that is probably eating a lot of fat, which contains a lot of collestral, which is, we know, the deposit which occurs in arthritis and causes these arteriosclerotic changes in arthritis, and arteriosclerotic plaques or little patches

(Testimony of F. G. Niemand.)

along the artery, from eating and drinking too much things that are high in fat content—too much cream and butter and eggs and things of that sort.

Q. Well, the calcification, as it applies to that there, that isn't the same thing which appears on the bones of the spine?

A. It is calcification, it is collesteral deposits, and of course, in the spine it becomes real bone.

Q. And then I read from Dr. Williams' conclusions, "degenerated lumbosacral disc with localized degenerative arthritis." [163] Do you agree with him in that conclusion?

A. Uh-huh (affirmative).

Q. And there is no way of you telling when that process—

A. No.

Q. —started or what caused it?

A. Oh, I know what caused it. He had some type of a fall some place, somewhere. I mean, that probably was a jackknife type of fall.

Q. It couldn't come through natural process?

A. Absolutely not.

Mr. Baraty: I will offer this document in evidence as Defendant's next in order.

Mr. Emmons: No objection.

(X-ray report dated 8/17/48 was thereupon received in evidence as Defendant's Exhibit D.)

Mr. Baraty: Now, if your Honor can bear with me a minute, I will probably get through very quickly.

Q. Now, doctor, how many times did you say you saw Mr. Graham?

A. About ten times.

(Testimony of F. G. Niemand.)

Q. When were those times?

A. Well, I saw him at the date of the first pictures, in that interval, and I saw him at one interval in between. I can't tell you that date, but in that interval in between, and I assume again on the date of the last pictures.

Q. Well, is that four times or ten times? [164]

A. Well, I mean, I assume several times in that period of time. For example, we had examined his back, sent him out to have the X-rays taken, he came back and I examined his back, put him through his paces again—things of that kind.

Q. You haven't got any office records with you about that?

A. Oh, I did the—I mean, no, I don't have anything with me but that can be obtained.

Q. Doctor, were those X-rays all made here in San Francisco? A. Yes, 450 Sutter.

Q. Mr. Graham came from his home in Searchlight, Nevada, or Needles, California, for each one of these examinations?

A. Well, I presumed he did. I mean, as far as I know, he did.

Q. He walked in there?

A. He said he did.

Q. Walked in there by himself? A. Yes.

Q. Now, what was the purpose of his visits to you?

A. Well, to ascertain what was the matter with his back and what could be done about it.

Q. Did you treat him at all? A. No.

(Testimony of F. G. Niemand.)

Q. Well, then, the purpose of your examination was so that you would be able to testify here in court?

A. No, my purpose was, one, to diagnose his condition, whatever was wrong with that—if it was testimony in court, that was part [165] of the procedure, but I was interested in getting Mr. Graham's back fixed.

Q. Well, when you made the examination, didn't you know that there was pending in this court a lawsuit by Mr. Graham?

A. He told me that he had—I didn't know it was in this court. He told me that the thing was a matter of litigation.

Q. In San Francisco?

A. Well, I didn't know where.

Q. You didn't know where? Did he suggest to you that you might have to testify in Los Angeles?

A. No.

Q. Never did? Now, doctor, in the three X-rays that you put on the box, the one I showed you, do you say that there is a protrusion of the intervertebral disc between the fifth and the lumbar and the sacrum?

A. No, I said that if we did—well, let me explain what we would do, what ought to be done before you do something.

The Court: Well, he just asked you—

Q. I understand that if, upon examination or operative procedure, you might find that the disc protruded or impinged on the nerve or the nerve canal—isn't that right?

(Testimony of F. G. Niemand.)

A. In the spinal canal.

Q. Yes, in the spinal canal.

A. The thing is that you would have to know that before you did your surgery. [166]

The Court: All right.

Mr. Baraty: Q. Doctor, that doesn't show up now, on those films that you have looked at today?

A. No, I didn't say it did.

Q. I see. To what extent would the injury that you are testifying about now disable a person?

A. Well, now, I don't know how to answer that. What do you mean by that? Could you explain to me what—I am not sure what you mean. Are you trying to ask me whether this injury is going to put him in bed, or what are you driving at, so that I can try to answer it intelligently.

Q. Well, Mr. Graham is a railroad man.

A. You mean, could he do railroad man's work?

Q. No, as a result of this accident here, to what extent would a rupture of a degenerative disc disable a man like that?

A. Well, suppose he had to carry out a 200 pound weight or something; he could lift that weight in carrying it out, but he would be incapacitated in lifting. He would increase the degeneration and increase the pain. He could do something that came up like that, but all he would be doing would be to increase the disability that he has, and therefore he would be incapacitated for any manual labor. So as a sensible process, or shall we say, a scientific process, you would not subject a man like this to that type of work or even to motion.

(Testimony of F. G. Niemand.)

I mean, every minute there is increasing the disability. [167]

Q. To the best of your opinion, the condition depicted by these X-rays, the three that you put on the box and that were offered by counsel for Mr. Graham, could have existed prior to July 6, 1945?

A. Uh-huh (affirmative).

Mr. Emmons: I submit that has been asked and answered, your Honor.

Mr. Baraty: That is all.

The Court: Any further questions of the doctor?

Mr. Emmons: I have some questions here. I will be very brief.

Redirect Examination

Mr. Emmons: Q. Now, doctor, calling your attention to this X-ray, Defendant's C, which is one from the Santa Fe Hospital, does this X-ray show the same crushed disc that the subsequent X-rays show?

A. Oh, yes, to my untrained eye it is apparent; of course, you might say I had seen it from the other ones, therefore I am going to see it in this one. But I can't understand how it could be missed, even in that one.

Q. It is in this one, and you see it?

A. Yes, very definitely.

Q. And could the average practicing attorney—I mean, doctor, practicing his profession, see such an injury in this X-ray?

Mr. Baraty: We will object to that question; it is [168] passing on the testimony of some other doctor and invading the province of the jury.

(Testimony of F. G. Niemand.)

The Court: I will sustain the objection.

Mr. Emmons: Q. It is there; there is no question about it? A. Yes, sir.

Q. Now, in Dr. Williams, report here on the X-rays, in regard to the two that you took, he says that there is again no evidence of fracture.

A. Well, what he says is regards a picture of the lumbar spine, but what he is answering is, that there is no fracture of the spine. He means the bony spine, the osseous portion of the spine.

Q. I see. So that the body of the actual vertebrae, there is no fracture? A. No fracture.

Q. And it is the "doughnut" in this case?

A. Which is the most important thing.

Q. All right.

A. You see, in a complex fracture, you have a fracture of the disc, too, and usually when you have that crushing injury, the flexing, the jack-knife, you crush a vertebra, and you crush discs in that process, and one is as bad as the other. In fact, you usually get both of them at the same time.

Q. Now, doctor, could there be, in your opinion, an impingement [169] of the nerve?

A. There is.

Q. There is an impingement of the nerve?

A. Yes, he has definite evidences, and that is one of our diagnostic findings in these disc things, that when you begin to find changes in the sciatic nerve—you see, because it is impinged and it begins to show the findings of numbness and the changes in skin sensitivity. I mean, that is one of the diag-

(Testimony of F. G. Niemand.)

nostic factors in disc injuries, the changes in either one of the legs, and that causes pressure.

Q. Now, in your opinion, then, the only way to obviate that or to cure it is by means of an operation, is that true?

A. There is no other way. I mean, if you want to cure the man, that is the only way. You can give him a belt and all that stuff, but that is just bunk.

Mr. Emmons: No further questions.

Recross-Examination

Mr. Baraty: Q. There is no crushing of the vertebrae here? A. No.

Q. No fracture of the bone? A. No.

Mr. Baraty: That is all.

Mr. Emmons: No questions.

The Court: Well, doctor, this report that Dr. Williams [170] gave you—you may sit down—it is your interpretation that what he means when he says, “There is again no evidence of fracture,” is that he is referring only to a part of the spine?

The Witness: He is referring to the vertebrae. You see, I asked him for a picture—

The Court: Q. Well, that is your interpretation? A. No, that is what he is saying to me.

Q. But below he says in conclusion, “There is a degenerated lumbosacral disc with a localized degenerative arthritis.” Now, doesn’t he mean in that statement that there is no evidence of fracture any place?

A. No, no, he means that there is no fracture of a vertebral body.

Q. All right.

(Testimony of F. G. Niemand.)

A. Because I asked him for that, for an examination of the spine, and he is not qualified to tell me anything else but that there is a degeneration of the space between there. It is a clinical finding from there on, not a radiological finding. I mean, the numbness of the leg and that sort of thing.

The Court: All right.

Mr. Baraty: Q. Dr. Williams has been a practitioner of good standing in the State of California a long, long time, hasn't he? A. Yes.

Q. Not only as a specialist in roentgenology, but also as a [171] physician and surgeon?

A. No, that is another Williams. This is Bryan Williams.

Q. Oh, I see. Yes.

A. But that is not Francis—you mean Francis Williams.

Q. I am talking about the Williams that took the X-rays.

A. Well, of course, every doctor is licensed as physician and surgeon when he is licensed.

Q. Before he specializes in roentgenology?

A. Yes. Then he is a roentgenologist if he specializes in it.

Mr. Baraty: That is all.

The Court: That is all, doctor.

Mr. Emmons: No further questions.

The Court: You may be excused.

Mr. Baraty: Will Mr. Graham please take the stand for further cross examination?

GEORGE H. GRAHAM

resumed the stand.

Cross-Examination—(Continued)

Mr. Baraty: Q. Mr. Graham, when you talked with Mr. Lewis, the claim agent at Needles, about the possibility of settling your claim, didn't he tell you that there was nothing [172] that could be done by him, because you had a lawyer in Los Angeles looking after it?

A. Something along that line.

Q. Something along that line. And what was the outcome of that?

A. Well, I told him that there was nobody representing me and to send a wire in there and inform them to that effect.

Q. You told who to send a wire?

A. Mr. Lewis.

Q. Mr. Lewis. Didn't Mr. Lewis tell you to send a wire?

A. He said he would send it; it wrote one out. I don't know if he sent it or not.

Q. Didn't you go to the Western Union Telegraph Company and send a duplicate wire to Mr. Irwin, who was then chief claims adjuster in Los Angeles, and another one to Mr. Tomkins, your attorney in Los Angeles? A. No.

Q. I am directing your attention to a wire that I have in my hand, a Western Union telegram dated—from Needles, California. The only date I can find on it is September 26, 1946. Would you please read that over and tell me whether that refreshes your recollection as to that? Can you

(Testimony of George H. Graham.)

tell whether or not such a telegram was sent by you?

A. I don't remember sending that telegram.

Q. You don't remember sending this telegram to Mr. Robert Irwin, [173] and a duplicate of it to Mr. Tomkins in Los Angeles on or about the 26th of September, 1945?

A. No, I don't remember that.

Mr. Baraty: Well, I ask that this be marked for identification as Defendant's next in order.

(Telegram dated 9/26/45 was thereupon marked Defendant's Exhibit E for identification.)

Mr. Baraty: Q. I am showing you a letter under date of September 26 on the letterhead of Emmett A. Tomkins, attorney at law, in Los Angeles, which I have just shown your counsel addressed to the A.T.S.F. Railroad and ask you to just read that over and see if that refreshes your memory concerning the sending of a telegram by you discharging Mr. Tomkins.

A. I don't remember this either.

Mr. Baraty: The document just given me by the witness, I will ask that that be marked as Defendant's next in order for identification.

The Clerk: Exhibit F.

(Letter dated 9/26/45 was thereupon marked Defendant's Exhibit F for identification.)

Mr. Baraty: Q. Do you know the signature of Mr. Emmett A. Tomkins, I think is his name—yes, Emmett A. Tomkins?

A. No, I wouldn't know it.

(Testimony of George H. Graham.)

Q. Well, he was your attorney in a former action that you filed in the Superior Court in Los Angeles, wasn't he? [174]

A. Well, I still don't think I would recognize his signature.

Q. I see. Well, now, then, you went to Los Angeles on the 30th of September as a brakeman on a passenger train—or was it as a switchman?

A. Well, I don't know; I went in there. If you have a record there, I must have, because I don't know just offhand what date I went in or what date I worked.

Q. The first time you went in to Los Angeles after this accident, about the time you made a settlement with Mr. Hitchcock in Los Angeles you went in as a paid job?

A. Well, I wasn't aware of that until you called my attention to it. If you have a record of it, it must be true.

The Court: No, all he wants to know is when did you go to Los Angeles in connection with the settlement of your case? Did you go as an employee of the company, either as a brakeman or as a signalman on a passenger train?

The Witness: Yes.

The Court: Q. Is that right?

A. Yes, I went in, but I didn't remember when.

Q. Well, not speaking about the date, just the fact that when you did go in, whenever you went in, you went as a brakeman on a passenger train, is that right?

(Testimony of George H. Graham.)

A. I don't remember. I thought I went in on a pass. I couldn't remember that.

The Court: Oh, he doesn't remember. [175]

Mr. Baraty: All right.

Q. Now, when you got to Los Angeles, did you go to the office of the Santa Fe Railroad Company at 6th and Main? A. I went up there.

Q. And you went up there of your own volition?

A. Yes.

Q. Nobody invited you there?

A. No, I went up there to see what could be done.

Q. Yes. And you went up there and sought Mr. Hitchcock? A. I did.

Q. In the claims department?

A. That's right.

Q. Mr. Hitchcock sits here in court now; do you recognize him?

A. Well, he looks a lot older. I wouldn't know him on the street.

Q. Don't we all?

A. I wouldn't know him on the street.

Q. All right. You mean to be pleasant, but anyway, that was the first time you saw Mr. Hitchcock?

A. No, I had met Mr. Hitchcock once before.

Q. Oh. Well, you knew him by sight or by having done business with him before?

A. The last time I saw him was on that date we were talking about.

Q. I see. Well, then, what did you say to him

(Testimony of George H. Graham.)

when you saw [176] him in reference to this matter? Did you explain why you were there?

A. Yes, I believe I did.

Q. Tell us about it.

A. Well, I don't remember what I said. I just probably told him I was in there to make a settlement so I could go back to work or something. I don't remember; that is so far back.

Q. Yes. Well, that is what the purpose was, isn't that right? A. That's right.

Q. And in a businesslike way, why, you two gentlemen settled this case?

A. Well, we got together on it.

Q. Yes. Now I am showing you a document that is dated October 1, 1945, bearing the signature "G. H. Graham," and I ask you if you ever saw that document before. A. Yes, I have seen it.

The Court: Q. Is that your signature on it?

A. Yes, sir.

The Court: Do you want to offer it in evidence?

Mr. Baraty: I do.

The Court: All right, mark it in evidence.

(Document dated 10/1/45 referred to was received in evidence as Defendant's Exhibit G.)

Mr. Baraty: Q. And with this document you received this check in the sum of \$1,050 payable to yourself. Tell us [177] whether it bears your endorsement. A. That's right.

Mr. Baraty: We will offer this check in evidence as Defendant's exhibit next in order.

(Check for \$1,050 referred to was received in evidence as Defendant's Exhibit H.)

(Testimony of George H. Graham.)

Mr. Baraty: Q. What does the "H" stand for in your name? A. Howard.

Mr. Baraty: I would like to read these documents to the jury, your Honor; they are not very lengthy.

The Court: All right.

Mr. Baraty: Defendant's Exhibit G reads as follows: First there is the claim number, giving the draft number, and entitled "Atchison, Topeka & Santa Fe Railroad Company, Coast Lines, Release in full, for the sole and only consideration of \$1,050, the receipt of which is hereby acknowledged, I hereby release and forever discharge the Atchison, Topeka & Santa Fe Railroad Company, Coast Lines, its agents and employees from any and all claims and demands which I have now or may hereafter have on account of any or all injuries, including any injuries which may hereafter develop as well as those now apparent, sustained by me at or near Needles, California, on or about July 6, 1945, while employed as brakeman; also for loss or damage to personal property. In making this settlement, I am not relying upon any statement made by any agent or official of said [178] company as to what my injuries are or how serious they are or when or to what extent I may recover therefrom. It is definitely understood that in making this settlement, no promise or representation has been made relative to future employment.

"I have read the above release and understand

(Testimony of George H. Graham.)

the same. In Witness Whereof, I hereunto set my hand and seal this first day of October, 1945.

“G. H. Graham.”

Then the word “Seal” and the word “Witnesses”, then names “Rosalie Dondero” and “F. H. Hitchcock.”

Mr. Baraty: Q. By the way, Mr. Graham, the words “I have read the above release and understand same,” is that written in your own handwriting? A. You mean this signature?

Q. No, above the signature.

A. Oh, this right here?

Q. Yes, “I have read—”

A. Yes, that is my handwriting.

Q. That is your handwriting? A. Yes.

Q. Now, this check for \$1,050, you cashed that in due course and the money became yours?

A. How's that?

Q. The money became yours, you took the money? A. Yes, I took the money, sure.

Q. And you never gave it back to the railroad company? A. No.

Q. And in the month of November, 1947, did you have \$1,050 ready to return to the railroad company? A. I did.

Q. Where was it?

A. Well, I could get my hands on it real quick.

Q. I know, but I say, did you have it? You said you did. Now where was it?

A. Searchlight, Nevada.

Q. In whose possession? A. Mine.

(Testimony of George H. Graham.)

Q. Was it in the bank? A. No.

Q. Was it in somebody else's name?

A. Well, I could get ahold of it. I have a few connections up there that I could get it.

Q. Do you mean you would have to borrow it?

A. Well, I didn't have to borrow it but I didn't have it in the bank and I didn't have it all together in one spot. But I could get it together. That is what I mean.

Q. Well, you didn't have it in the bank; did you have it in money or greenbacks or anything?

A. Money.

Q. Well, where was it? [180]

A. Well, if I tell you, you might go out there and find my plant, or something.

Q. That's right. Maybe you can accuse me of that. But you are the only one that can do that. But you can't tell us where you have this money?

A. Well, I had it within a reasonable place.

Q. What does that mean?

A. I might have had some in my house.

Q. No, tell us where you had it, not where you might have had it. Where did you have it?

Mr. Emmons: He said some in his house.

Mr. Baraty: He said that he might have had some in his house.

A. I had some in the house, if you want to know. I wasn't completely broke.

Mr. Baraty: Q. Did you have \$1,050 in your house?

A. Not at one time, no. I don't believe I did. But I could get it.

(Testimony of George H. Graham.)

Q. How much did you have in your house?

A. Oh, I don't know.

Q. You don't know? A. \$400, \$500, \$600.

Q. \$500 or \$600 in the house; is there a bank at Searchlight? A. No.

Q. Is there a bank at Needles? [181]

A. There is a bank at Needles, but I have never been down there—very, very seldom.

Q. That is where you get paid at Needles, isn't it? A. No.

Q. When you work for the railroad company?

A. Well, yes, but I have been away from that railroad a long time.

Q. Since July. Now is there a bank at Boulder Creek?

A. There is one at Boulder City.

Q. Boulder City, I mean.

A. And one at Las Vegas.

Q. Where else? A. Las Vegas.

Q. You didn't have any account in any of those places? A. I did have in Las Vegas.

Q. You had an account at Las Vegas at the time, in November of 1947?

A. No; '47—well, I had a few chips in there, a little money in there.

Q. How much, what do you mean by "chips"?

A. Two or three hundred dollars, maybe.

Q. What bank? A. The Bank of Nevada.

Q. The Bank of Nevada at Las Vegas?

A. Yes. [182]

Q. Now you never got this money in one lump and went to anybody in the Santa Fe and said,

(Testimony of George H. Graham.)

“Here is \$1,050 that I want to return to you; I am not satisfied with the release?”

Mr. Emmons: I will submit that that is objectionable, if your Honor please, on the ground that there is in the files of this case a written offer to restore \$1,050. It is a matter of record in this case; it is on file in this case.

Mr. Baraty: That is easily prepared, your Honor, but we would like to know if he could comply with that offer, and that is the purpose of these questions. I submit the question now put is proper.

The Court: I will overrule the objection. Will you read it, Mr. Reporter?

(Record read.)

A. Well, I think I wrote my lawyer's office to do that, to—

The Court: Well, what the attorney wants to know is, you never actually tendered the \$1,050 in money to anybody in the Santa Fe?

The Witness: Oh, I may have tendered it, Judge.

The Court: Beg pardon?

The Witness: I have had that much money, yes

The Court: No, no, the lawyer wants to know whether you actually went to anybody in the Santa Fe and offered them \$1,050 in money at any time.

The Witness: I made that request of my attorney. [183]

The Court: Well, now, I think you understand what I am talking about; we know you wrote a

(Testimony of George H. Graham.)

letter, but what the attorney wants to know is, did you take \$1,050 in money down to the Santa Fe and say, "Here, I offer it to you, I want to have this release changed."?

The Witness: I understand you now. No, I didn't.

Mr. Baraty: Q. You didn't do that, and you didn't tell your lawyers to deliver \$1,050 to the Santa Fe Railroad? A. How's that?

Q. You didn't tell your lawyers to deliver \$1,050 to the Santa Fe Railroad, did you?

A. Well, I don't remember just what I did tell them, but something along that line, that I was ready to give the payment back or—

Q. Did you tell your lawyers to deliver \$1,050 to the Santa Fe Railroad?

A. I don't remember.

Q. You don't remember. What is the best memory you have on it? Yes or no.

A. I am hazy on lots of things. I just don't know.

Q. Well, you don't know. Well, isn't it true that you never made any such demand on your lawyers? A. No, that isn't true.

Q. What?

A. I don't believe that is true, no. That I never made any [184] offer you mean?

Q. No, did you ask your lawyers to deliver \$1,050 to the Santa Fe Railroad in November of 1947? A. Yes, I did.

Q. Or since?

A. Well, I don't know just what date it was.

(Testimony of George H. Graham.)

Q. Well, did you ask them any date?

A. I did.

Q. You did? A. I did, I believe.

Q. Where were they going to get the money?

A. Well, I could get the money for them, some way.

Q. Did you tell them that you were going to get the money and then that you would send it to them and they were going to deliver it to the railroad?

A. Well, I guess that would be the procedure.

Q. The fact of it is that you didn't have \$1,050 to return to the railroad—

Mr. Emmons: I will submit that that is argumentative, your Honor.

Mr. Baraty: Q. (Continuing) —at any time?

Mr. Emmons: Just a moment. I submit that that is argumentative, your Honor, and has been asked and answered.

The Court: You have asked it before, counsel.

Mr. Baraty: I know I did. We have a witness here who is [185] evasive, and I think we ought to get a—

Mr. Emmons: Well, that is your opinion.

The Court: Well, counsel, you have already asked him those questions, counsel. You can ask in detail as to where he had the money, if he did have it.

Mr. Baraty: Q. How long before November, 1947, did you have \$1,050 to return to the Santa Fe Railroad Company?

Mr. Emmons: I will submit that is immaterial,

(Testimony of George H. Graham.)

your Honor, as long as he had it at that time.

Mr. Baraty: I think it is preliminary to another question I am going to direct to him, and I think it is a fair question to ask, your Honor, under the circumstances here.

The Court: Well, I think you have already covered it, but I will overrule the objection.

The Witness: Could you repeat that, please?

Mr. Baraty: Will you read that, Mr. Reporter?

(Record read.)

A. I don't know offhand. I have a little money, as I say, and I have a couple of friends in Las Vegas. I could have got probably two or three times that amount, if you want to come right down to the fact of it. I have some friends, yes.

Mr. Baraty: Q. Did you have that amount of money at the time you filed the complaint, August 30, 1946?

A. No, I don't believe I did. Not that much. But I had three or four hundred dollars on me.

Q. And you weren't in a position to obtain it in August, 1946, as well as you were in November of 1947?

A. Well, I could go and get it.

Q. Well, could you get it in August of 1946, when you filed the complaint in this court?

A. Yes, I believe I could.

Q. You didn't try, though?

A. I went to Las Vegas and got—

Q. You didn't try?

A. Well, it didn't come to a showdown.

Q. Now, after going to Los Angeles on Sep-

(Testimony of George H. Graham.)

tember 30, 1945, on second 23, and after signing that release and obtaining from Mr. Hitchcock the \$1,050, did you go back to work for the railroad company? A. I did.

Q. And on February 16, 1946, were you dis-

A. Most all the month of October.

Q. And a portion of November?

A. A portion of November.

Q. In December of 1945 you were in the hospital part of the time? A. That's right.

Q. And you worked a portion of January of 1946? A. That's right.

Q. And on February 16, 1946 you were discharged from the [187] railroad company for a violation of Rule G?

A. That occurred, but there was no doctors' sobriety test or nothing taken.

Q. You were discharged from the railroad company for a violation of Rule G, were you, Mr.—?

A. That is what they put on the discharge.

Q. You were granted a trial on that, were you not?

A. Well, I wouldn't call it an investigation; it was a—I would like to ask my lawyer to answer that.

Q. Well, you were discharged anyway, on that day? A. I was discharged.

Q. I would like to read you, out of the rules of the Santa Fe Railroad Company, Rule G.

Mr. Emmons: If your Honor please, I will object to that on the ground it is incompetent, irrevelant and immaterial, and even if admitted,

(Testimony of George H. Graham.)
would tend to prove no issue in this case.

Mr. Baraty: It was brought out on direct examination, and without the aid of the rule, it doesn't mean anything.

The Court: I will overrule the objection.

Mr. Baraty: (Reading) "Rule G. The use of intoxicants or narcotics is prohibited."

Q. Now, Mr. Graham, do you admit or deny that you received from the Santa Fe Railroad Company for services rendered by you to the company in the month of January 1945 the sum of \$284.67 [188] and no more?

A. In January 19 what?

Q. '45.

A. Well, I have earned more than that.

Q. No, in that month.

A. Well, I couldn't say because I haven't got my old time slips.

Q. You can't say whether that is true or not true?

A. Well, I have earned more. I can't say just what I earned in the month of January because I have no way of proving it or checking it.

Q. Would you say that it is true that in 1945, the month of February, you received \$235.27 for services rendered that month to the company?

A. I think that it a little bit shy there. I think I made more than that. I worked pretty steadily.

Q. Well, I will read you these all at once and ask for your reply.

Mr. Emmons: If your Honor please, at this time may I object to this as not having proper

(Testimony of George H. Graham.)

foundation; the proper procedure would be to bring that man from the railroad company who prepared these and if those are the correct records, to establish that fact and let it go along with the record. This is taking up the time of the Court and jury.

Mr. Baraty: I don't want to do this, and your Honor knows the way these things are ordinarily proved—it is usually just [189] by stipulation. But this matter of the amount of money this man made was brought out on direct examination, and I think I am entitled to cross examine him on that and see if it—we have had a great deal of difficulty, your Honor.

The Court: I will overrule the objection. You may proceed.

Q. (Mr. Baraty): Will you say that it is true or not true, that in the following months you received the following amounts that I am about to indicate to you from the Santa Fe Railroad Company for services rendered by you to the company? Now we can eliminate the first two months that I have already mentioned. You have answered as to those.

In March of '45 \$384.28; April of '45, \$346.76; May of '45, \$424.23; June of '45, \$382.95; July, 1945—that is the month of the accident—\$75.20; August, nothing; September, 1945, \$90.95; October, 1945, \$213.44; November, 1945, \$156.53, plus some back or vacation pay of \$40.44; December, 1945, nothing; January of 1946, \$66.67.

Now, is it true or untrue that you received those amounts for those months from the company?

(Testimony of George H. Graham.)

A. In September, that is untrue.

Q. \$90.95?

A. I couldn't have possibly made that in one trip or one day, and I am sure I didn't work at all in September—maybe one day, or I don't know what. But—— [190]

(Conversation among counsel outside hearing of reporter.)

Mr. Baraty: All right, Mr. Smith draws my attention to sheets which are entitled "Train and Engine Men's Time Sheet." Thereon it is shown that on September 30, on Second 23, with Dressler, Engineer, the witness earned \$11.25.

Q. That is the time you came into Los Angeles in September and you were paid—

Mr. Smith: That was hours, 11 hours and 20 minutes.

Mr. Baraty: Excuse me. That was wrong. What is it?

(Conversation between Messrs. Smith and Baraty outside hearing of reporter.)

Mr. Baraty: Let me revamp that question.

Q. Is it true that on September 30, 1945, when you came in on Second 23 with Dressler as engineer, with a total of 11 hours, 25 minutes, you were paid for those services the difference between \$90.95 and \$76.72, about \$14?

A. Well, I don't remember the transaction, but if I went to work that day, I must have worked.

Q. That is the only day you worked in September

A. Must have been.

Q. And is this such as to refresh your memory,

(Testimony of George H. Graham.)

that \$76.72 was for vacation pay coming to you?

A. I had some vacation pay coming.

Q. Well, yes.

A. But I don't remember when I got it. [191]

Q. And if I tell you that those two totals, the 11 hours, 25 minutes that you took to come to Los Angeles that day on the 30th on the train as a brakeman, the \$76.72 total, \$90.95 in September, 1945, would you say that is true?

A. If you have got it, it must be; but I don't remember that, and I couldn't earn that much money in one day.

Q. No, but you could earn \$14.00 in one day on that trip, 11 hours? A. That's right.

Q. And the difference, \$76—don't you know how much back pay you had for vacation coming to you?

A. Well, I haven't got all that stuff. I have lost some in a fire, and I don't know.

Q. Well, you wouldn't concede, then, that what I am asking you here is correct, from the company's books?

A. Yes, but I worked only one day. If I worked that day, I couldn't have earned no \$76 on vacation pay. If that came, that is something else.

Q. I agree with you, sir; I am telling you only that you earned just \$14 that day. The rest was for vacation pay coming to you.

Mr. Emmons: If Your Honor please, if counsel is going to testify, I think he should take the witness stand and be sworn.

Mr. Baraty: I am cross-examining the gentleman.

(Testimony of George H. Graham.)

The Court: Well, you have spent quite a little time on [192] it.

Mr. Baraty: Yes, I know; Your Honor is very patient and I perhaps do take too long.

Q. May I inquire for the year 1944. I will read these things and when I am through I want you to tell me to the best of your memory if it is the true amount of what you received for your services for that period of time from the company.

January, 1945, nothing; February—these are all 1944—February, \$150.80; March, \$305.23; April, \$302.34; May, \$359.07; June, \$343.78; July, \$305; August, \$344.88; September, \$362.93; October, \$417.14; November, \$513.69; December, \$348.73. Making a total of \$3,753.59 paid you for services rendered in 1944. Is that true?

A. That is more or less along there because I have——

Q. That is about right?

A. Yes, that is about right.

Mr. Emmons: What is that total, counsel?

Mr. Baraty: \$3,753.59.

Q. Now, have you ever had any other injuries or sustained any other injuries while working for any of the other railroads you were working with?

A. How's that?

Q. Have you ever hurt yourself before?

A. No, sir, outside of my brken hand.

Q. And did you ever hurt your elbow? [193]

A. Well, that was broken years and years ago.

Q. How long back?

(Testimony of George H. Graham.)

A. Oh, maybe 20 years.

Q. Who were you working for then?

A. Myself.

Q. What was that, in Mexico?

A. In Tampico, Mexico.

Q. And did you ever have trouble with headaches or nervous spells? A. No.

Q. Do you recall filing an action against the Atchison, Topeka & Santa Fe Railroad Company in the Superior Court of Los Angeles in November of 1944 for an injury claimed to have occurred near Seligman, Arizona?

A. I remember that.

Q. I have just shown your counsel a certified photostatic copy of the complaint that I have mentioned, and I ask you whether your signature appears on the last page, what we lawyers call the "verification."

A. That is my signature.

Q. Yes. Sworn to?

Mr. Emmons: May I object to this on the ground, Your Honor, that it is incompetent, irrelevant and immaterial, has no tendency to prove any fact in issue in this case.

Mr. Baraty: We are attempting to prove the existence of [194] prior injuries to this gentleman that occurred at the date mentioned in his sworn complaint here, some time in 1944.

The Court: What do you intend——

Mr. Baraty: We are going to offer it in evidence.

The Court: What is the materiality of this? He

(Testimony of George H. Graham.)

said something about a broken wrist, I understood.

Mr. Baraty: No, I want to ask him concerning the injuries he speaks of here, some of which are similar to the ones——

The Court: Well, let me see the complaint.

Mr. Baraty: Yes, sir. May I direct your attention to paragraph 4. It is important.

The Court: Well counsel, I don't see the materiality of that. What has that got to do with this case? He said he was bruised. He alleged in this complaint that he was bruised and that he hurt his hand.

Mr. Baraty: They are alleged to be permanent in this case in their duration.

The Court: Well, every lawyer that files one of these complaints always puts that in there.

Mr. Baraty: Your Honor, this is not a lawyer who verified; it is verified——

The Court: Well, I don't think that there is anything material to it. I will sustain the objection. There is nothing proper presented in that matter.

Q. (Mr. Baraty): Did Mr. Emmett A. Tomkins—— [195]

The Court: It is very obvious that even though a person gets bruises and burns and some lawyer says in a complaint that they are permanent, that they are not always. You could question the witness about that if you wished, but I don't think that that document is admissible.

Mr. Baraty: Well, I was hesitant to do something Your Honor didn't want me to do, but I will accept your invitation and question him.

(Testimony of George H. Graham.)

Q. What injuries did you sustain at the time of the accident at Seligman, the date of which appears as November 16, 1943? A. Broken hand.

Q. Did you sustain any shock, severe and permanent shock, to your nervous system?

A. No, I was kind of hit here, and I hit the edge of the caboose where the cupola of the caboose was, due to that slack action.

Q. Do you have any bruises on your head?

A. No.

Q. On your body? A. No.

Q. On your person?

A. No, just my hand was broken.

Q. Did you break and injure your hands or only one hand? A. One hand.

Q. One hand. [196]

Mr. Emmons: If Your Honor please, we are not trying that case here and I submit it is incompetent, irrelevant and immaterial, what took place at that time.

The Court: Well, counsel, Mr. Baraty intimated that he thought there was some similarity to the injuries involved, so I thought and I suggested that he could examine the plaintiff as to what injuries he did suffer then.

Q. (Mr. Baraty): Well, did you have any headaches as a result of that accident of 1943?

A. No, no.

Q. And is this Los Angeles case numbered 479538 the one which you said yesterday you had long since directed your attorney to dismiss?

(Testimony of George H. Graham.)

A. I can't get all that.

Q. Is this the case that you testified to yesterday, that is pending in the Superior Court of Los Angeles County, numbered 479538, that you instructed your attorney, Emmett A. Tomkins, long ago to dismiss?

A. I told Mr. Tomkins to withdraw the case and to give me my papers back, which he did.

Q. So those were your instructions?

A. Those were my instructions to him. I talked to him verbally.

Q. You stand on that today?

A. How's that? [197]

Q. You stand on that now?

A. I have always stood on it.

Q. Good. Mr. Smith suggests to me something that I forgot. When did you tell Mr. Tomkins to dismiss this action in Los Angeles?

A. Oh, I don't remember the date.

Mr. Baraty: I would like to have that marked for identification, Your Honor, as Defendant's next in order, inasmuch as we have been talking about it.

(Certified copy of complaint referred to was marked Defendant's Exhibit I for identification.)

Q. (Mr. Baraty): Now, what work have you been doing since you left the service of the Santa Fe? A. None at all.

Q. Have you been doing any manual labor at all? A. None.

(Testimony of George H. Graham.)

Q. Do you own or have you an interest in some gold possibilities there in——

A. I have got some gold property up there, yes.

Q. Is it assessment property?

A. How's that?

Q. Assessment property that you have to do a certain amount of work every year?

A. Well, I haven't had to do any of that work, due to the moratorium on intentions to hold. We don't have to do any, and [198] since I have had that property and the former tenant's claim, I have to pay the taxes on it.

Q. And you have done no labor on it at all?

A. No.

Q. Haven't got anything off of them?

A. No, I haven't. I have had several matters come up; I thought I had a sale, but it hasn't materialized, so that the thing is just rocking along.

Q. Do you live up there?

A. I live there.

Q. How long have you lived there?

A. Oh, I have been out there at the mine since November.

Q. You live there with Mrs. Graham or by yourself?

A. Oh, she is out there.

Q. How far away is that from Searchlight?

A. Oh, about two miles from Searchlight.

Q. So you haven't any place for living in Searchlight, but it is out at the mine?

A. It is out at the mine.

Q. I see. Now, you went back to the Santa Fe

(Testimony of George H. Graham.)

Hospital, did you, the Hospital Association in Los Angeles on December 14, 1945?

Mr. Emmons: I submit, Your Honor, that that has been asked and answered several times.

The Witness: December 10. [199]

The Court: Yes, you have asked him that several times.

Mr. Baraty: I am just laying a foundation for the question I want to ask next; I want to show what his complaints were.

The Court: Well, ask him that.

Q. (Mr. Baraty): At that time did you give your complaints, reading as follows:

“Chills, sore throat and a fever of one month’s duration, slight nausea of one month’s duration and cough. Patient has had some chilly sensations, headaches, sore throats, a fever for about one month. There is also slight nausea when he eats. Patient has been treated in outpatient department, decided to be admitted to house.”

Did you give that history when you went to the Santa Fe Hospital Association?

A. Well, I was having a high fever and throat trouble.

Q. Yes.

A. And Dr. Holtz treated me and Dr. Price, under the instructions of Dr. Morrison. But Dr. Holtz told me—I complained of pain in my back, and I told Dr. Keeney it was a severe pain and Dr. Holtz told me he wasn’t treating me for my back, he was treating me for my throat.

(Testimony of George H. Graham.)

Q. Yes. No treatment was given you for your back?

A. They gave me some heat treatments.

Q. And you left there on December 20, 1945?

A. That's right.

Q. And you didn't again return to the hospital, did you? A. How's that?

Q. You didn't again return to that hospital?

A. No, I haven't been back since——

Mr. Baraty: Your Honor, I am showing counsel rather a lengthy document. I don't know what your pleasure is about adjournment.

The Court: Well, have you more cross-examination?

Mr. Baraty: Well, a little more, but I don't think I would be finished by 4:15. I wouldn't be long in the morning.

The Court: Well, how many witnesses has the plaintiff got?

Mr. Emmons: I have one more, Your Honor.

The Court: Short or long?

Mr. Emmons: I don't anticipate it will be more than a half hour.

The Court: Well, that is pretty long.

Mr. Emmons: I mean for both direct and cross.

The Court: How long for the defendant?

Mr. Baraty: We will have a doctor; we have scheduled him for 11:15 tomorrow, and we have to accommodate him if we can.

The Court: Yes, that is all right; we shall do that.

Mr. Baraty: And we have three short witnesses.

(Testimony of George H. Graham.)

The Court: Well, do you think all the evidence could be [201] completed tomorrow?

Mr. Baraty: I don't think there is any question about it, Judge.

The Court: Would you prefer to take an adjournment, both sides?

Mr. Baraty: I would, if it is agreeable.

Mr. Emmons: Very well.

The Court: I try not to keep juries later than 4:30, because you have some from Richmond and Oakland and Berkeley and all over, and transportation is difficult, I know.

We will take a recess until tomorrow morning at 10:00 o'clock, ladies and gentlemen. Please bear in mind the admonition I have given you.

(Thereupon an adjournment was taken until tomorrow, Thursday, August 19, 1948, at 10:00 o'clock a.m.)

Morning Session, Thursday, August 19, 1948, 10:15

The Clerk: Graham vs. The Santa Fe Railroad, on trial.

Mr. Baraty: The defense is ready.

Mr. Emmons: Ready, Your Honor.

GEORGE H. GRAHAM,
the plaintiff herein, resumed the stand.

Cross-Examination (Continued)

Q. (Mr. Baraty): Mr. Graham, I have just shown to your counsel a letter under date of February 20, 1946, at Needles, California. I am showing it to you and I ask you if that is your signature on that letter.

A. I have a copy of that letter.

(Testimony of George H. Graham.)

Q. That is your signature to that letter?

A. That's right.

Mr. Baraty: We offer this in evidence as Defendant's Exhibit next in order and ask leave to read it to the jury.

Mr. Emmons: If Your Honor please, I will object to that on the ground it is incompetent, irrelevant and immaterial, tends to prove no issue of fact in this case, and ask that it be stricken.

Mr. Baraty: This is cross-examination, Your Honor. It has to do with injuries claimed here, some of them.

(Document handed to Court through Clerk.)

The Court: I will overrule the objection. [203]

(Letter dated 2/20/46 referred to was received in evidence and marked Defendant's Exhibit J.)

Mr. Baraty (reading):

"Needles, California, February 20, 1946.

"Mr. A. J. Smith

"Superintendent, A. T. & S. F. Ry.

"Needles, California.

"Mr. E. C. Charles, Claim Adjuster, A. T. & S. F. Ry.

"Needles, California.

"Gentlemen:

"On December 12, 1944, I was called at 1:00 a.m. for 1:35 at Needles for a westbound freight train. I drove my car into a garage which I was renting monthly from brakeman Ambron, which was located about two blocks from where I live. After I had placed the car in this garage and locked

(Testimony of George H. Graham.)

the garage door, I had an altercation with a Santa Fe engineer and there were some blows struck. This engineer at the time was in the company of another man. After this altercation I left and walked up Front Street and crossed over from the Reading Room to the high sidewalks, continued on down to a point opposite the Santa Fe ticket office, when a man by the name of H. D. Flacklam, a Santa Fe brakeman, jumped out from behind a palm tree by the ticket office and struck me a blow alongside my head and also one over my left eye, cutting my forehead. [204] The only witness was a colored man who called the Santa Fe special agents. I don't know this colored man's name. I tried to defend myself, but this man ran away after striking me.

“A Santa Fe special officer encountered me in front of the trainmen's board, outside of the crew dispatcher's office. While he was questioning me as to my trouble with this man, Conductor C. G. Rogers came by. This is the conductor I was called to go out with—my regular conductor. Rogers asked me what the trouble was and I told him what happened and he advised me to go to the hospital and have my forehead fixed up. I told him no, I would just wash up my face and go out on my run. The special officer asked me if I would swear out a warrant against this party after I came back from my run and I told him I would. After I came back from my run, I swore out a warrant against Flacklam, but in the meantime he left Needles and went to Los Angeles. About four days later he got off of No. 4 at Needles and was picked up by police

(Testimony of George H. Graham.)

officers on the strength of my warrant. I did not appear at the hearing as I was on the road. This man was given a fine and 60 days' jail sentence suspended for one year.

"This blow, I believe, is the cause of the extreme headaches I have been having since that date. I have not called attention of this matter to the company as I did not [205] want to make any more trouble, but conditions have changed since that time, and I wish to bring the matter to your attention.

"Yours truly, G. H. Graham, Brakeman.

"L. J. Burton, Brakeman, Witness.

"C. G. Rogers, Conductor, Witness."

Q. Mr. Graham, I will ask you if it is not true that on October 29, 1914, at 9 o'clock p.m. while you were working for the Texas & New Orleans Railroad in the yards at Houston, Texas, and employed as a switchman that you did sustain the following injuries:

"Abrasion and slight contusion of right lower jaw, abrasion of right elbow, sprain of right ankle, slight abrasion on lumbar region of back, complains of pain in right shoulder and back, but no other external evidences other than given at present."

Is that a true recital of the injuries sustained by you at that time?

A. I know nothing about that.

Q. You know nothing about that? Did you ever work for the Texas & New Orleans Railroad Company?

A. No, I never have.

(Testimony of George H. Graham.)

Q. I am showing you a document here, sir; I will ask you to look at it, please, and on the second page, tell us whether that is your signature to the affidavit and the document. [206] A. No.

Q. "George Howard Graham," as appears twice on the second page, is not your signature?

A. No, I don't recognize it as such.

Q. Does this document refresh your memory as to whether you had ever worked on the Texas, New Orleans Railway Company? A. No.

Q. Who is Roy V. Kibbee?

A. I don't know him.

Q. Do you know a person by that name? Did you ever know a person by that name, who resided at 622 West 75th Street, Los Angeles, California?

A. No, I don't.

Q. Were you ever married to a lady by the name of Mrs. Lydia Graham? A. No.

Q. Whose residence is given as Denver, Colorado, 1545 West Bayward Street. A. No.

Q. Were you ever employed by the Denver, Rio Grande Railway Company as a brakeman or otherwise? A. No.

Q. Is it or is it not a fact that the date of your birth is August 1, 1888? A. No. [207]

Q. Is it or is it not a fact that you were born at Chippewa Falls, Wisconsin? A. No.

Q. That is not true? A. That is not true.

Q. What date were you born?

A. August 1, 1897.

Q. August 1, 1897? A. That's right.

(Testimony of George H. Graham.)

Mr. Baraty: Your Honor, I would like to ask the witness to step down to the table and write the name "George Howard Graham."

Mr. Emmons: I submit that that is improper cross-examination.

Mr. Baraty: I don't think it is.

Mr. Emmons: No proper foundation has been laid.

The Court: What is this, with reference to some injury or injuries in 1914?

Mr. Baraty: No, in reference to——

Mr. Emmons: The whole thing is incompetent, irrelevant and immaterial.

Mr. Baraty: No, in reference to the matter of employment with this railroad, and the possible injuries, and also as to the matter of his age.

The Court: In 1914 those injuries were? [208]

Mr. Baraty: Yes, and the matter of his age. This document is signed on October 17, 1914.

Mr. Emmons: The matter is too remote.

The Court: Yes, I think the matter is too remote.

Mr. Baraty: May I point out to Your Honor that with the claim of permanent injuries here, we are concerned with a matter of the man's age, and there are some matters of identity that will develop later, too, and that is why I say that we are concerned with his statement, or a person's statement as to what his age might have been, no matter when. I ask permission now to ask him to sign his name, "George Howard Graham."

Mr. Emmons: Why, if Your Honor please, if

(Testimony of George H. Graham.)

the man signs his name now, how could there be any similarity to the name signed in 1914?

Mr. Baraty: That is a matter for the jury.

Mr. Emmons: Well, if that is a matter for proof, let's have expert proof on it. I think the whole matter——

Mr. Baraty: Otherwise we can't have any basis for that, Your Honor.

Mr. Emmons: I think the whole matter is too remote.

Mr. Baraty: I submit, Your Honor, that we are entitled to it.

The Court: Well, you have the signature on that document here that is already in evidence.

Mr. Baraty: It looks to me, Your Honor, that we are [209] entitled to know the identity of this man and the date of his birth.

The Court: Well, that may be so, but I think that is too remote and vague to ask a man for his signature now and then refer that or compare it to an alleged signature of someone having the same name—maybe the same man—I don't know—34 years ago. That is too remote.

Mr. Baraty: We have got the same date of birth—as to the month and day as he has testified to here, August 1. We have a different year date, and we have a different place of birth. Now we are trying to find out on cross-examination whether the testimony that he has given here as to his identity, as to his birth, as to his place of birth, is true or whether some other thing is true.

Mr. Emmons: He has already denied all those

(Testimony of George H. Graham.)

things, Your Honor, and that should be sufficient. It is now up to them to prove it otherwise, if they can. Secondly, this whole matter is so far remote when they go back to the very first day of his birth, to try to dig up something which they can pin on this man. Secondly, that is too far remote.

Mr. Smith: The reason, if the Court please, that we would like to have Mr. Graham write his full name is that we don't have an example of his signature and his full name. The release which he signed, he signed "G. H. Graham." We think it is the same. However, we think it is for the jury to decide, [210] whether the man that signed this document, giving his age as a matter of four or five years difference, is the same man as Mr. Graham. It is certainly a material point. If counsel in his opening statement says that he is permanently disabled and intends, as he says, to ask the jury to give damages based on some type of life expectancy, it is certainly material to know whether or not the man was born in 1888 or 1897.

The Court: Yes, that is material, but I am in doubt as to the materiality of requiring the witness to sign his name.

Mr. Smith: Well, it would then be something that the jury could decide, whether it was his signature or not. That is a question of fact for the jury, and if they have an example signed "George Howard Graham" as the signature is here, they will be in a position to decide. I mean, if it is not his signature, why, I don't see why he should have any objection to signing it.

(Testimony of George H. Graham.)

Mr. Emmons: Well, I think that is an improper remark to be made by counsel. Why should he have to sign his name when it is not required of him to do so?

The Court: Well, the only materiality of this matter is a matter of age, so far as I can see.

Mr. Emmons: To go back and get his signature when he was ten years old and require him to sign his name and compare it, that is too far remote.

Mr. Baraty: We are not asking him for that. We have a [211] discrepancy, as Mr. Smith points out, of nearly ten years.

The Court: Well, that is the same matter. Do you intend to present any other evidence on the subject?

Mr. Baraty: Well, the question is pending before you now in order to reach the point, the matter of having his name. We have further documentary evidence that we will produce as we go along on this subject. So, do you want to reserve ruling on that for a moment?

The Court: Well, if it is merely a question of age, I consider the incident that is referred to as being too remote in point of time to be a matter that the jury could properly consider. But, of course, the matter of the man's age is in issue, and it is pertinent to this proceeding.

Mr. Smith: If the Court please, in addition to that, on the matter of the injury about which he was questioned, we will produce medical testimony that the injury which he suffered or claims to have suffered from at this time could have resulted, or

(Testimony of George H. Graham.)

arisen in childhood. That will be the medical testimony which will be produced.

The Court: Well, that is a matter of medical testimony, but that has nothing to do with this matter.

Mr. Smith: And the first question that Mr. Baraty asked him was whether he had suffered an injury in 1914 while working for the Texas & New Orleans Railway, and which injuries included an injury to the lumbar region of the back. Mr. Graham denied [212] that and denied ever working for the Texas & New Orleans Railway. Now it certainly bears on his credibility to determine if he did work for the Texas & New Orleans Railway and when our medical testimony will also be to the fact that the back condition which he has now may date back to childhood, it is relevant to know that, if it could date back to this period of 1914.

Mr. Emmons: I submit that is too remote, Your Honor. He may have had countless injuries during his lifetime. It is certainly incompetent, irrelevant and immaterial in this case. It is not material.

Mr. Baraty: Well, does Your Honor desire to reserve his ruling on writing his name, or do you want to rule on it?

The Court: I will see what the evidence shows further. For the time being, I will sustain the objection, and you may renew your request later.

Mr. Baraty: We offer this document as Defendant's next in order for identification.

(Testimony of George H. Graham.)

(Personnel record dated 10/17/14 was there-upon marked Defendant's Exhibit K for identification.)

Q. (Mr. Baraty): Mr. Graham, you have testified here that you were never employed by the Santa Fe, the Atchison, Topeka & Santa Fe Railway, before your employment in 1943?

A. How's that.

Q. You stated here yesterday under oath that you were never employed by the Santa Fe Railway Company, the Atchison, Topeka [213] & Santa Fe before your employment in 1943?

A. I testified to that, yes.

Q. What?

A. I believe that question came up.

Q. Well, you so testified? A. I did.

Q. I am placing in your hands some documents I have just shown your counsel and they consist of an application for situation, a surgeon's certificate, and a brakeman's examination. I will place them in your hands for your perusal and ask you if that happens to refresh your memory on the question of your first employment with the Santa Fe.

A. I don't know anything about this.

Q. May I show you on the last page of what is marked "Application for Situation," dated June 16, 1916, and tell us if the signature on the first place is "George Howard Graham"—that is not too legible, but another place it is "George Howard Graham." Tell us if that is your signature. The first one is here, which is not too legible, and the second one is there.

A. No.

(Testimony of George H. Graham.)

Q. That is not your signature? A. No.

Q. Do you recall taking an examination as a brakeman for the Santa Fe on August 10, 1916?

A. No. [214]

Q. It is not true that you were born in Chipewa Falls, Wisconsin, then, is it? A. No.

Q. You don't know anybody, or you have never known anyone by the name of Roy C. Kibbee, who resided at 622 West 75th Street, Los Angeles, California? A. No, I don't.

Q. Isn't he a cousin of yours? A. No.

Q. Were you in the year 1916 married to a lady by the name of Jessie Graham? A. No.

Mr. Baraty: We will ask that these documents be marked as Defendant's Exhibit for identification next in order.

(Employment record dated 1916 was marked Defendant's Exhibit L for identification.)

Q. (Mr. Baraty): Were you in the year 1917 employed by the Galveston, Harrisburg & San Antonio Railway Company? A. No.

Q. I will show you a document that I have just shown to your counsel, where the name "George Howard Graham" appears in signature twice, once before a notary public, and I will ask you to examine that document and see if that refreshes your memory.

Mr. Emmons: Answer out loud, Mr. Graham.

A. No, I don't know. [215]

Q. (Mr. Baraty): That is not your signature that appears on this document? A. No.

(Testimony of George H. Graham.)

Q. Were you born in Denver, Colorado, on August 1, 1890? A. No.

Q. In the year 1917 were you married to a Mrs. Thelma Graham, whose residence was Fresno, California, at 1347 L Street? A. No.

Q. You don't know any such person?

A. No.

Q. In 1917, did you know a person by the name of Roy C. Kibbee, 622 West 75th Street, Los Angeles, California? A. No.

Q. Have you ever worked for the Cripple Creek Short Line? A. No.

Mr. Baraty: We will offer this document for identification as Defendant's next in order.

(Personnel record dated 1917 was marked Defendant's Exhibit M for identification.)

Q. (Mr. Baraty): I am showing you another document, Mr. Graham, that I have just shown to your counsel, which bears the signature, "George Howard Graham," and then the same before a notary public, and I ask you to examine that and tell us whether that refreshes your memory as to whether that is your signature or whether you ever worked for that company. [216]

A. No, I never.

Q. Will you look at the signature on the second page, the signatures, and tell us whether "George Howard Graham" is your signature.

A. No, that is not mine. I never signed that.

Q. And "George Howard Graham" before the notary public at El Paso? A. No.

Q. That is not your signature?

(Testimony of George H. Graham.)

A. No, neither one of them.

Q. Were you born August 1, 1891, at Denver, Colorado? A. No.

Q. In the year 1917—I will withdraw that because you have already answered the question. Did you ever live at 1205 Wyoming Street, El Paso, Texas? A. I didn't hear you.

Q. Did you ever live at 1205 Wyoming Street, El Paso, Texas? A. No.

Mr. Baraty: We will offer this for identification as Defendant's next in order.

(Personnel record dated 1917 was marked Defendant's Exhibit N for identification.)

Q. (Mr. Baraty): Can you tell us by whom you were employed in the year 1914?

A. I wasn't employed, to my memory. [217]

Q. Can you tell us by whom you were employed in the year 1916?

A. No, I couldn't tell you offhand. I don't remember.

Q. Can you tell us by whom you were employed in the year 1917? A. No.

Q. You don't know what type of work you were doing in the years '14—1914, 1916 or 1917?

A. No.

Q. When did you first go into the railroad business?

A. About 1919, 1920, along in there.

Q. And the first job was what?

A. Brakeman.

Q. What company? A. I. & G. N.

(Testimony of George H. Graham.)

The Court: Well, ask him the direct question as to whether he was.

Q. (Mr. Baraty): Were you ever convicted in the United [220] States District Court for the Southern District of Texas, Houston Division, in an act that involved counterfeiting United States money?

A. Yes, but that wasn't a felony conviction.

Mr. Baraty: Well, ask that part be stricken out because the law says it is. The answer that it wasn't a felony conviction, I mean.

The Court: Well, what is the record that you have shown counsel?

Mr. Baraty: There is a felony. There are two pleas of guilty to counterfeiting United States Treasury notes.

The Court: What date?

Mr. Barity (reading): "The cause came on regularly for hearing"—and then it shows the date, Your Honor.

Mr. Emmons: I suggest that you let His Honor read that.

Mr. Baraty: Maybe the Court could find it quicker than I could.

Q. (The Court): In 1936 did you plead guilty to a charge against you in the Southern District of Texas? A. I did.

Q. You served a term in prison?

A. Five months in New Orleans County Jail and \$100, fine.

Mr. Emmons: I submit that is not a felony.

(Testimony of George H. Graham.)

The Court: Well, it is under federal law. You were indicted by a United States Grand Jury on a violation of federal [221] law. The fact that the Judge imposed a sentence less than a year and a day is immaterial.

Mr. Baraty: There was a further sentence, I believe, 18 months suspended with probation for five years on the fourth count.

Mr. Emmons: That is all admitted, Your Honor. That is incompetent.

The Court: Well, I think you have got sufficient.

Q. (Mr. Baraty): May I ask you, in that case, Mr. Graham, if you are not also known as "George H. Graham," and——

Mr. Emmons: If Your Honor please, I will object to that on the ground it is absolutely incompetent to go into details of the commission of any offense.

The Court: Well, I wouldn't permit counsel to do that.

Mr. Baraty: I am trying to get at the question of identity, Your Honor.

The Court: He is apparently identifying him by name.

Mr. Baraty: That is all I want.

The Court: Yes.

Q. (Mr. Baraty): You were not known in that action in the United States District Court, Houston Division, as George H. Graham, G. G. Howard, Howard Graham, Jack Graham, and Graham Howard?

(Testimony of George H. Graham.)

A. No. I never signed my name that way.

The Court: However that may be, he wants to know if that [222] is the way you were indicted down there.

The Witness: Well, I don't know, Judge. I just don't remember.

Mr. Baraty: We will offer this document in evidence, Your Honor.

The Court: Well, if it is offered in evidence, that means it has to be read to the jury and considered, and you may only inquire as to the criminal record for impeachment.

Mr. Emmons: I submit it is inadmissible on that ground, Your Honor.

Mr. Baraty: I would like to establish the identity of the various aliases that apparently have been admitted by the plaintiff.

The Court: Is that a certified copy?

Mr. Baraty: Yes, Your Honor.

The Court: Well, you have already read the designations of the defendant in the indictment, and that is in the record.

Mr. Baraty: All right.

Mr. Emmons: I think that is all that is necessary.

The Court: Do you wish to have the witness sign his name now?

Mr. Baraty: Yes, Your Honor.

The Court: All right, put the table up there and let him sign it.

The Witness: Your Honor, I would like to ex-

(Testimony of George H. Graham.)

plain that [223] matter, if you will give me the opportunity.

(Piece of paper and fountain pen handed to witness.)

Q. (Mr. Baraty): George Howard Graham, will you please sign your name?

A. (Witness signed name.)

The Clerk: Shall this be marked for identification, Your Honor?

The Court: Yes.

(Record of conviction referred to was marked Defendant's Exhibit O for identification.)

Q. (Mr. Baraty): Would you please sign "George H. Graham" further down on any line that is convenient? A. (Witness complied.)

Mr. Baraty: Thank you. We will offer this exemplar in evidence, Your Honor, as Defendant's exhibit next in order.

(Signature exemplars referred to were received in evidence and marked Defendant's Exhibit P.)

Mr. Baraty: That is all, Your Honor. It is recess time, I see, and Dr. Soto-Hall is here at our request, and I was going to ask counsel and Your Honor if we could put the doctor on right after recess out of order.

The Court: Very well.

Mr. Baraty: That is all of the witness.

The Court: We will take a recess at this time, ladies and gentlemen. Please bear in mind the admonition of the Court. [224]

(Recess.)

Mr. Baraty: Your Honor, I forgot, but during the cross-examination of Mr. Graham, we forgot to offer in evidence the four applications, so named, and we now offer them in evidence, those which were offered for identification only.

Mr. Emmons: I will object to that on the ground that it is incompetent, irrelevant and immaterial and that they are too remote in time.

Mr. Baraty: We have got signatures for comparison for the jury.

The Court: I will overrule the objection. They may be admitted.

(Defendant's Exhibits K, L, M and N for identification were thereupon received in evidence.)

Mr. Emmons: If Your Honor please, will they be admitted for the sole purpose of comparison of signatures, and not for the contents stated therein?

The Court: Well, if they are admissible for the date, whatever the date of birth, and to that extent they are admissible.

Mr. Emmons: Thank you.

Mr. Baraty: With permission of counsel and Your Honor and the plaintiff, we will go forward now and call Dr. Soto-Hall, because he happens to be here. [225]

RALPH SOTO-HALL

called as a witness on behalf of the defendant, sworn.

Q. (The Clerk): Will you state your name to the Court and jury, please?

(Testimony of Ralph Soto-Hall.)

A. Ralph Soto-Hall.

Direct Examination

Q. (Mr. Baraty): Doctor, where is your office? A. At 350 Post Street.

Q. San Francisco? A. Yes.

Q. And your profession is that of physician and surgeon? A. Yes.

Q. When were you admitted to practice in the State of California? A. 1923.

Q. And since that time you have practiced your profession continuously here?

A. No, I spent several years in postgraduate work after 1923 in Europe and in the East, and then later also I was away four and a half years during the war.

Q. And what institution of learning are you a graduate of?

A. I received my medical degree from the University of California Medical School.

Q. In what year? A. '23.

Q. 1923. [226] A. That's right.

Q. '23? A. That's right.

Q. Now, do you specialize in any branch of your profession? A. Yes, in orthopedic surgery.

Q. And are you a member of any societies that have to do with your profession?

A. Yes, I am a fellow in the American College of Surgeons and in the American Orthopedic Society, the American Academy of Orthopedic Surgery, in the Western Orthopedic Society, and some others.

(Testimony of Ralph Soto-Hall.)

Q. And what is orthopedic surgery?

A. That is the branch of surgery and of medicine that deals with diseases and injuries of bones and joints.

Q. During the last war, were you in the service, the armed service in that particular branch?

A. Yes, I was the orthopedic consultant for the army overseas in Eastern England, and then I was later orthopedic consultant with headquarters in Chicago, the Central Area.

Q. What was your rank in the army?

A. Lieutenant Colonel.

Q. Now, since your release from the service, you have gone back to your active practice here locally? A. That's right.

Q. And have you another service that you are connected with in [227] reference to the government now?

A. Well, I am just a civilian consultant. I am not in the service. I am civilian consultant to the Surgeon General.

Q. Of the United States Army?

A. That's right.

Q. And you have just returned from a tour of hospitals in Europe?

A. Yes, I went on a consulting and lecturing tour for the Government in occupied zones of Austria and Germany.

Q. Are you connected with any medical schools now?

A. Yes, I am assistant professor at the Univer-

(Testimony of Ralph Soto-Hall.)

sity of California Medical School in the orthopedic department.

Q. Now, Doctor, have you had occasion within the last few days to examine the plaintiff here, George Howard Graham, in your office?

A. Yes.

Q. Would you give us the result of your examination, what you did, what you found?

A. Well, we took the usual history and carried out an orthopedic examination of his back and reviewed some X-rays that had been taken soon after injury. We found Mr. Graham to be suffering from a degenerative intervertebral disc, the last lumbar disc, and he complained of backache. The examination showed that the disc was a lesion of very long standing, and in the X-rays—perhaps I could show the X-rays. It might be [228] easier to describe what I found.

Q. Yes, we have four in evidence and I will put them at your service in chronological order. You can use them as you please. There were two that were taken by Dr. Williams in San Francisco. The date appears to be September, 1946, as printed here. There was one in August, 1948, and then there was one taken at Boulder City February 13, 1946. The one you have in your hand is taken, was taken a little over a month after the accident, August 16, 1945, at Santa Fe Hospital in Los Angeles. Now, with those could you guide the jury in your explanation of what you found in Mr. Graham's back?

A. These were the films that I had an opportunity to study at the time I examined the patient.

(Testimony of Ralph Soto-Hall.)

And they clearly show the pathology here, the changes, the abnormality in the last inter-vertebral disc. This is the fourth, or the second to the last, lumbar vertebra, and here is the fifth or the last lumbar vertebra, and you will see that between these two is a space which is dark, which is occupied by this disc, which is a cushion between the two vertebrae.

These discs have no blood supply and they tend to degenerate rather easily. They are one of the many causes of backache. And in the second one here, you see that this space has disappeared and you also see opposite the previous space in the vertebra in the adjacent surfaces of the intervertebral bodies, you see a whiteness which is new bone formation; that [229] is, a bone that the individual was not born with, but which developed over a period of years. It is a response of bone to irritation, to chronic irritation.

Then in front here, you see this bone formation. Those are projections of bone to try to start nature's effort to splint and stop the motion in that area. This calcium that is visible here is not associated with the spine, that is hardening of the arteries of the abdominal—the abdominal arteries. It is not in the spine itself.

Our examination showed that he had some discomfort at this site, and it was our interpretation that this man has had a degenerative disc over many years. This could not occur, certainly, in less than three or four years, and probably very much longer

(Testimony of Ralph Soto-Hall.)

than that; and that was probably the cause of his symptoms.

Q. Now, do the other X-rays—do you want to use them at all, or——

A. I think these could be shown.

Q. The date on that one, Doctor, is——

A. February 13, '46. These are taken with a little different intensity. Films that come from different laboratories are like photographs that come from different cameras and different people. Some show different shadows and different intensity but the actual outline remains the same, of course. Here again, you see the narrowing here, the upper disc is not as easily [230] visible, but you can see the separation between them in the normal disc, and here you have the narrowed disc with the bony response to the irritation, to the chronic irritation, and the narrowed space.

Q. Does that one have the date?

A. This one is August 16, 1948. These are technically better films. Again you see the normal disc above and below you see the narrowed disc, the bony reaction at the edges of the vertebrae, and the white area due to sclerosis or hardening of the bone from chronic irritation of the vertebral body against the upper part of the sacrum.

Q. Now, Doctor, that calcification, how does that come about?

A. Well, it actually isn't calcification, it is a deposit of bone. It is very much similar to a callous in your hands. You see a thickening of your skin

(Testimony of Ralph Soto-Hall.)

from a callous forming. Well, that is a comparable phenomenon in the spine. You might call it a callous formation from the chronic irritation between two vertebral bodies.

Q. What is your opinion as to the time of the origin of that growth?

A. I don't—that isn't actually a growth. You mean of the——

Q. The degeneration.

A. Oh, the degeneration of the disc. The minimum, I would say, would be three or four years, and the more likely thing is a question of some 15 years or so. We see them quite often in [231] individuals who have had injuries in their teens or in their twenties. They will have a fall, and then over a period of years you see the development of this narrowing and this sclerosis.

A fellow orthopedic surgeon has a very good case, in that he had his wife fall off a horse in her twenties, and he has been able to follow her. Now she is about 48, and it is a beautiful case, and it demonstrates the narrowing of the disc occurring over a number of years and being intershaded by the fall in the twenties.

Q. For the benefit of those X-rays before you, would it or would it not have been possible that the process of injury to that disc occurred as far back as 1914?

A. The man is now, I think he gave me——

Q. I think he gave you the age as 51.

A. 51, yes. He is biologically a little older.

(Testimony of Ralph Soto-Hall.)

Mr. Emmons: I will submit, Your Honor, that that should be stricken on the ground it is not responsive.

Mr. Baraty: I think that is the opinion of a medical man; it is of value.

Mr. Emmons: It is not responsive to the question.

The Court: Well, it might not be. What is your question—how old did he tell you he was?

Mr. Baraty: No, I didn't ask the doctor that question, but he gave me an idea and I will ask him that question and [232] find out.

The Court: Well, ask one thing at a time and let's find out.

Q. He told you that his age was 51, is that right? A. Yes, sir.

The Court: Now, go ahead.

Q. (Mr. Baraty): Biologically, what is your opinion of his age?

A. We don't know the chronological age of people, we only go by the biological age of people; that is, as old as their tissues are. I would say he is considerably older biologically. I don't know what his chronological age is.

Q. Now, Doctor, do those X-rays show any protrusion of the disc?

A. Well, these types of film would not show protrusion.

Q. They would not?

A. They can't show protrusion. You would have to have a myelogram to do that. But clinically,

(Testimony of Ralph Soto-Hall.)

you can determine that almost as effectively as any other way.

Q. Did you find any signs of protrusion on examining him?

A. No, the usual signs of protrusion which we have—four or five of them are pretty accurate. We had absolutely none of them positive. They are all negative. He had no neurological changes. The reflexes were equal and normal. There were no sensory changes. [233]

Q. Could this degeneration have started in 1914?

Mr. Emmons: I submit that has been asked and answered.

Mr. Baraty: I don't think he answered it. That is one of the questions he didn't answer.

The Court: Very well.

A. Yes, it could have started that early and he could have started even without trauma. A certain number of them just degenerate without injury in their middle life. That is in the thirties.

Q. Could it start from a physical encounter, a first fight or something like that?

A. Oh, I don't know; it all depends on how badly you get beaten up.

Q. But it is your opinion that what you see now, and from your examination of this condition, that it existed long prior to—

Mr. Emmons: I submit that has been asked and answered, Your Honor.

Q. —prior to July 6, 1945?

A. There is no question that the degenerative

(Testimony of Ralph Soto-Hall.)

disc pre-existed that date, '45. That is a condition of very long standing. There is no question about it.

Mr. Baraty: I think that is all.

Cross-Examination

By Mr. Emmons:

Q. Doctor, is it usual practice in San Francisco for an orthopedic surgeon to operate on injuries of [234] this particular type?

A. You mean on degenerative discs?

Q. Yes.

A. Yes, we do quite a number of them. I would say that the way we would do them in San Francisco and at the University, and I think the University of California has been a leader in the demonstration of the pathology of this condition—if there is a protrusion, which often there isn't, but if there is a protrusion, a neurosurgeon operates with us and does the nerve part, and we do the bone part. I would say we have operated on a dozen in the last few months, which is a fairly good percentage.

Q. I see. How many of these cases have you treated?

A. Discs?

Q. Yes.

A. Well, I would say I saw just in the neurological center that I just lectured in in Germany, I must have seen several hundreds. I would say—Just a moment. You asked me the question so I am going to give you just one year. I see never less than several hundred a year.

Q. I see. How many have you operated?

(Testimony of Ralph Soto-Hall.)

A. How many have I operated in the last year? I would say maybe 15 or 20. And in my office maybe 35 or 40.

Q. You have performed the operation yourself?

A. Yes, we fuse our discs when they are that bad. Now, if it [235] is our feeling that degenerative discs—now your word, answering the degenerative discs now—it is our feeling that the degenerative discs, about 90 per cent or more, respond to conservative treatment. So out of a hundred, there will be perhaps ten that are eligible for operation, of which some will not be operable and some will. [235-A] So that out of the hundred cases, there will be eligible for surgery perhaps five or six. I am giving you my impression, not actual statistics.

Q. Yes. Now you have mentioned a neurologist; isn't it a fact that in these operations a neurologist does the operation?

A. No, not a neurologist. They don't operate.

Q. Who does the operation?

A. The orthopedic surgeon and the neurosurgeon.

Q. Well, does the neurosurgeon operate?

A. Yes, he operates.

Q. What performance does he do in such an operation?

A. Well, we do two things; we open it, and then sometimes we operate it and sometimes they operate it. When the exploration has reached the nerve part, the neurosurgeon does the neurological

(Testimony of Ralph Soto-Hall.)

side of the operation, and then we do the orthopedic side of the operation. We almost always work together.

Q. I see. But generally speaking, doesn't the orthopedist usually just diagnose the case?

A. Certainly not.

Q. I see. That is not the practice, then?

A. It is certainly not.

Q. Now in these X-rays that you have examined here, doctor, there is no question that there is a disc there, is there?

A. I wish you would be more specific, because the disk is——

Q. Well, there is no question that there is a degenerative [236] disk? A. That's right.

Q. And you say it is of long standing?

A. That's right.

Q. And you say it could be of the duration of three to twenty years prior to July 6?

A. Or even more. We can't determine after the reaction has reached that stage, how long it is, except that it cannot occur within a period of a number of years.

Q. You examined this man on what date, doctor? A. August 14.

Q. And how long was he in your office?

A. Well, I couldn't tell you. He had a complete examination and we took a history. I really couldn't tell you. I see maybe thirty-five operations a day, and I really don't know how long. All that I can answer is that it was long enough to have all the necessary data obtained.

(Testimony of Ralph Soto-Hall.)

Q. Did he give you a history of the trauma in question? A. That's right.

Q. And the fact that he was in a caboose when it was struck by two switch engines?

A. That's right.

Q. And as a result, he fell approximately six feet to the small of his back, and then when he got to his feet, he was knocked to the floor again by the action of the engine [237] reversing its direction, and the caboose dropping to the track?

A. That's right.

Q. That is the history that you have?

A. That's right.

Q. And from your examination of the X-rays, you stated that there has been a development for a long period of this disk. Now isn't it a medical certainty that as the result of trauma, that pre-existing disability which you have mentioned is exacerbated or flared up a sudden trauma?

A. That can happen, yes, sir.

Q. Well, isn't it a fact, doctor, that that happened in this case?

A. Well, he may have had exacerbation. The question is that I am willing to grant that this man had an exacerbation, probably as a result of his injury, but——

Q. Let me ask you this:——

A. All right, may I finish?

Q. Oh, yes, I am sorry, doctor.

A. (Continuing): I don't want to confuse the issue. The man had, in my opinion, some back

(Testimony of Ralph Soto-Hall.)

pain, and probably had this disk over a number of years. That is my personal impression of the case.

Q. All right. But notwithstanding this——

A. That's right. [238]

Q. ——this injury or this accident, or rather, this injury or this accident exacerbated and caused it to flare up and become a disabled condition?

A. It is possible, yes.

Q. Yes. Now it is also possible, isn't it, doctor, that prior to the time of the accident, this was a non-disabling condition?

A. Well, I couldn't tell you as to the disability, because I didn't examine him there. It could be disabling, or it could not be. I could say that it could be or he could not be disabled. He could have pain, and perhaps he could work or not. I couldn't tell you.

Q. Well take, for example, assuming that this man has been a railroad man in the type of work he told you he was doing, and that he worked steadily for a number of years prior to the time of this accident, and then after the accident, he was disabled. Would you say that his pre-existing condition was disabling or non-disabling?

A. If he had been working continuously, obviously it was not disabling.

Q. Very well. Now did you examine the X-rays which were taken by the Santa Fe Hospital?

A. Yes.

Q. Of this man, in August of 1945?

A. Yes, they are here. [239]

(Testimony of Ralph Soto-Hall.)

Q. I see. Will you put them on the stand, there?

A. (The witness inserted X-ray in shadow box.)

Q. Does that X-ray there, doctor, which is the one taken by the Santa Fe Hospital doctors in 1946, August of 1946, show the same degenerative disk?

Mr. Smith: I think it was '45.

Mr. Emmons: Yes, '45, I beg your pardon.

A. Yes, I have described that that shows the degenerative disk.

Q. (By Mr. Emmons): Yes. Now, doctor, could anyone or any doctor practicing in this state, in looking over that or examining that particular X-ray, miss or omit seeing that disk?

Mr. Baraty: Now, that is the same question we had yesterday, calling for the doctor's—

Mr. Emmons: This is cross-examination, if your Honor please.

Mr. Baraty: Well, it is argumentative, and it is attempting to invade the province of the jury. It is not for this doctor to decide for some other doctor.

The Court: Well, I suppose a doctor could miss it if he didn't look at it or didn't have good eyesight. It is a purely argumentative question. If it is there, it is there. It doesn't make any difference whether anybody else saw it or not.

Q. (By Mr. Emmons): Well, now, doctor, you rendered an opinion, [240] according to that X-ray, haven't you? In other words, you say that by reason of that X-ray, you can see that that man has a degenerative disk?

(Testimony of Ralph Soto-Hall.)

A. That's right; yes, sir.

Q. Now is that a matter that doctors could honestly and reasonably differ in regard to their opinion?

A. I don't follow you. You mean that if two of us saw that X-ray sitting at the same time and one would say that there was no degenerative disk here?

Q. Yes, is it possible for men trained as you are to see those things?

A. Well, not everybody is equally trained, as you know. In a city like San Francisco, there may be fifteen or seventeen who are Board Members, you see, and there may be a thousand doctors. So I couldn't tell you what the training of another man would be.

Q. Well, go to Los Angeles; aren't there many trained specialists down there?

A. Yes, that's right, there are about seventeen members of the Board.

Q. Don't you suppose, or do you know, whether or not there were adequately trained men in the Santa Fe Hospital in Los Angeles?

A. I don't like to answer that.

Mr. Baraty: I feel that this is objectionable, your Honor. [241]

The Court: Yes, I will sustain the objection. We have got enough to do to decide this case, without finding out who the best doctors are in Los Angeles.

Mr. Emmons: All right, your Honor.

(Testimony of Ralph Soto-Hall.)

Q. (By Mr. Emmons): Now, doctor, would this subsequent disability as a result of this trauma cause permanent injury?

A. Oh, he has a permanent condition.

Q. It is permanent?

A. He has a permanent condition of long standing. The degenerative disk is not going to be built up over night. That has been present there, and you just—the only thing—if he were a younger man, you could perhaps do something for him. But naturally, in an older individual, they often settle down, they have some back pain, but they are able to carry on the type of work which they are doing, which their age allows them to do.

Q. Now, in your opinion, would this man be able to do manual labor?

A. Oh, I don't think he is suitable in any way for heavy manual labor now.

Q. You do not think so?

A. I don't think so.

Q. Does he have a definite limitation of motion in his back? A. Yes.

Q. In that particular region? [242]

A. Throughout the back.

Q. Yes. Does that have a tendency to increase as time goes on?

A. Many of these things do, yes, with age.

Q. Now, what treatment should he obtain to gain relief?

A. Well, I think with his age and other than wearing a support and modifying his type of labor,

(Testimony of Ralph Soto-Hall.)

which so many people do as they get to his age, I think that is the best treatment for him. He has no evidence of a protrusion whatsoever, no clinical evidence of protrusion, which would make his case a surgical one.

Q. Now is that a matter upon which reasonable doctors could differ in regard to their opinion?

Mr. Baraty: Same objection.

The Court: Yes, I will sustain the objection.

Q. (By Mr. Emmons): Now, would you say that what he should have is a back brace of some kind?

A. A belt.

Q. A belt? A. Yes.

Q. Now, when the two vertebrae and the disks degenerate, the two bones come together, don't they, and if they are worn completely across, then they grind each other, is that correct?

A. Well, not exactly, but perhaps.

Q. Well, as an illustration, I mean, that is what takes place? [243]

A. Well, the disks are very much like the old sacks that we used to put—not we, but that they used to put when the ferry boats landed. That is, that is their function, to protect.

Q. A cushion, is that it?

A. To protect two hard surfaces from coming against each other, and when they degenerate, as they do here, then the hard surfaces touch each other and they produce this bone reaction.

Q. And doesn't that cause an impingement of the nerve?

A. Not necessarily, no.

(Testimony of Ralph Soto-Hall.)

Q. Not necessarily. But aren't the symptoms which Mr. Graham has indicative of an impingement of the sciatic nerve? A. No.

Q. You think not?

A. No, definitely not. He has no—you see there actually isn't any sciatic nerve involved ever in a disk, but the root, and there is no evidence of any of the roots being involved. You have anesthesia, parathesia or reflex changes, atrophy; those things are absent in the case. We can only go by physical findings, which we find in these cases.

Q. Now, as a matter of fact, you can't tell that from a clinical observation, can you? You have to take a myelogram, isn't that right?

A. No, we go as much on clinical examination as a myelogram, although a myelogram is helpful. A myelogram may be used in case of doubt.

Q. You never operate until you take a myelogram?

A. Oh, yes, modern neurosurgery today is done just as much with as without a myelogram.

Q. Just for the purpose of explanation to the jury, would you explain what a myelogram is?

A. Yes. A radio opaque substance is injected into the spinal canal and allowed to circulate back and forth, and if there is a block, there is a bulge seen of soft tissue, of transparent tissue, whereas the substance that has been injected shows very white, because it is radio opaque.

Mr. Emmons: I have no further questions, doctor.

(Testimony of Ralph Soto-Hall.)

Redirect Examination

By Mr. Baraty:

Doctor, the fact that Mr. Graham returned to and did work for several months after the injury of July 6, 1945, would that indicate to you that there had been no flare up of this old situation?

A. No, I wouldn't say that entirely. I think there could have been a flare up, as I answered before. But the fact that he returned to work would be helpful in evaluating the amount of severity of the exacerbation or the kicking up.

Mr. Baraty: I think that is all.

Recross-Examination

By Mr. Emmons:

Q. Now, suppose, doctor, he went to the hospital the next month and made the same complaint and continued to make the same complaint that he is making at this date. [245] Would that cause you to change your opinion in that respect?

A. Well, the fact he was able to carry on for several months, if that is true—I don't know it to be true—if a man is able to continue with regular, normal work for several months, I have granted he could have as a result of the accident a flare up. Evaluating the flare up, the amount to me, these factors must be considered: First, we know he must have discomfort before, from an examination of his spinal films. Two, from the fact that he went

back to work, I would say that his flare up wasn't too great; but I have granted that he could have a flare up as a result of the accident.

Mr. Emmons: I think I have no further questions.

Mr. Baraty: That is all.

The Court: That is all, doctor. Thank you.

(Witness excused.) [246]

GEORGE H. GRAHAM,
previously sworn; resumed the stand.

Redirect Examination
(Resumed)

By Mr. Emmons:

Q. Now, Mr. Graham, calling your attention to the caboose and your duties as a flagman, who was responsible for the markers on the caboose?

A. The flagman. I was.

Q. You were responsible for them?

A. I was.

Q. And why are they taken down?

A. Well, when you are off duty, why, when you leave your caboose, you take your markers down.

Q. I see. Now, is there a switch,—just for the purpose of clarification—is there a switch at this point? A. There is a switch there.

Q. There is a switch. Let's see—I will make a little square (marking blackboard) and call that a switch. One other thing. Now, this curve that you were talking about that extends from the main line and leads into this point, this switch, is that a sharp curve or a gradual curve?

A. A long, gradual curve.

(Testimony of George H. Graham.)

Q. A long, gradual curve. Now what happens in the event you fail to take your markers down on a car?

A. Why, they fire you, or give you ten demerits, at the least. [247]

Q. I see. Now, do you have any recollection of working on September 31, 1946?

A. I don't.

Q. And what makes you feel that you didn't work on that date?

A. Oh, I don't believe I went to work until after I saw the claim agent and got a release from him, to my best recollection.

Q. Now, this money that you received from the Santa Fe Railroad, did you have a sufficient amount of money or credit to pay that money back to the Santa Fe Railroad?

A. I believe I could have gotten it together at the time, if it had been demanded of me.

Q. Did you have any agreement with your lawyers in regard to paying that man?

A. Yes—well, yes.

Q. What was the agreement?

A. In the event I couldn't get it all together, they would help me out on it.

Q. I see. So that at all times, if necessary, you could have obtained \$1050 to repay the Santa Fe Railroad? A. I believe I could have.

Mr. Baraty: That is leading and suggestive, your Honor. I object to it on that ground.

The Court: I will sustain the objection.

(Testimony of George H. Graham.)

Mr. Baraty: May the answer go out?

The Court: The answer may go out. [248]

Q. (By Mr. Emmons): Well, what was the agreement, Mr. Graham?

The Court: He has already answered. He said the lawyers would help him out if he couldn't get the money.

Q. (By Mr. Emmons): At the time that you executed this release, did you have some property up there in Searchlight? A. I did.

Q. Did you own that property? A. I did.

Q. Do you still own it?

A. I still own it?

Q. Did you own it on the date that you rescinded this release? A. Yes.

Q. Now, is that property now, or was it then, worth \$1,000 or more? A. Oh, yes.

Q. And could you have obtained more than \$1,000 for it?

A. I could have gotten that without much trouble.

Q. And could you have borrowed \$1,000?

A. Oh, yes.

Q. Your wages, Mr. Graham—the railroad here has designated in 1944, the highest month, to be \$515 or \$513 I guess; is that about right?

A. Well, along in there. I have made that much.

Q. And the average for that particular year was somewhere around \$312.71. Is that approximately right? [249] A. That is possible.

Q. When you left Searchlight—I mean, Needles

(Testimony of George H. Graham.)

—to go to Searchlight on the morning of the accident in your automobile, you testified, I believe, that you didn't have any trouble. What was it that you didn't have any trouble with?

A. I didn't have any car trouble.

Q. Did you have any trouble with your back?

A. Oh, yes, I was in bad shape.

Q. Did it pain you on the trip home?

A. Oh, yes.

Q. Were you able to drive your car after that for a while?

A. Well, I didn't drive for several days, I don't believe. My wife handled the car.

Q. Now, how did you get along, Mr. Graham, not working?

A. Well, I had a little money.

Q. You had a little money yourself?

A. Yes.

Q. And was your wife working?

A. She was the postmistress there.

Q. She was the postmistress where?

A. At Searchlight.

Q. At Searchlight. Does it take a lot of money for you to live up there?

A. No, not so much.

Q. I see. Now, the question of your age has come up, Mr. Graham. [250] Did you enter the service of any railroad at any time prior to your twenty-first birthday?

A. What birthday?

Q. Twenty-first.

A. No.

Q. Isn't there a company rule, or is there a

(Testimony of George H. Graham.)

company rule, that forbids the hiring of minors?

A. That's right.

Mr. Baraty: What company rule? I will object to it as being indefinite.

Mr. Emmons: May I have your Rule Book, counsel?

The Court: Well, we are getting into extraneous matters. This didn't happen?

Mr. Emmons: Well, the thing is, your Honor——

The Court: When this man was twenty-one years of age?

Mr. Emmons: Well, in some of these things, I believed, he would be seventy-three years of age at the present time, and he would have been employed at a time when he was about fifteen or sixteen years of age.

The Court: I think you misread the figures.

Mr. Baraty: The earliest date is 1885. That wouldn't be seventy-three.

Mr. Emmons: Well, Rule 302 provides that no minor may be employed. I would like to read it into evidence, if I may.

Mr. Smith: I think the record will show that one the [251] Santa Fe, he showed he was twenty-five years old when he first went to work.

The Court: Well, we are wasting too much time on immaterial matters. Is it agreed that the railroad doesn't hire people under twenty-one? Any question about that?

Mr. Baraty: Well, he can read the rule. We don't know about it.

(Testimony of George H. Graham.)

The Court: Well, it takes too much time to go into these immaterial matters. I will tell the jury that for all practical purposes, they may consider that people under twenty-one are not hired by the railroads; although I don't see the materiality.

Mr. Emmons: I will read the last sentence.

The Court: Go ahead and ask some other questions. Don't take up our time with these matters.

Mr. Emmons: I have no further questions.

Recross-Examination

By Mr. Baraty:

Q. Mr. Graham, that property at Searchlight, when did you acquire it and what did it cost?

A. Forty-three and four.

Q. Forty-three and four?

A. And forty-four.

Q. What did it cost? A. How's that?

Q. What did it cost? [252]

A. Oh, I paid the taxes on some of the patent ground and got that, and the unpatented ground, why, relocated it.

The Court: But he wanted to know how much it cost.

The Witness: Oh, I don't know.

Q. (By Mr. Baraty): Well, it is a mining claim?

A. That's right.

Q. Didn't cost you anything but taxes and an assessment or assessments?

A. Well, I hired the assessment work done.

Q. That is all it cost?

A. I guess so, \$100 a piece, the claims.

(Testimony of George H. Graham.)

Q. Is it in your name or in your wife's name?

A. In both our names. She owns so much and I own so much.

Q. Now, did you ever try to borrow any money on it, ever?

A. Well, no, but I can on the Golden Garter.

Q. You what?

A. On that patented claim, the Golden Garter; it is a valuable claim.

Q. You never attempted to borrow any money on it?

A. No, I never have borrowed money.

Q. And at the time of this accident, was the lady you afterwards married, the postmistress there?

A. She was postmistress there.

Q. Is she there now, as postmistress?

A. No, she gave it up. [253]

Q. That doesn't bring very much compensation in, that little place, does it?

A. How's that?

Q. That doesn't bring very much pay in a little place like Searchlight?

A. I don't understand the question.

The Court: He says the postmistress doesn't get very much money in a little place like Searchlight?

The Witness: Oh, about \$90 a month.

The Court: About \$90 a month.

Q. (By Mr. Baraty): Yes. Now, did you have any agreement with the first lawyers you had in this lawsuit to reimburse the Santa Fe for the money——

(Testimony of George H. Graham.)

Mr. Emmons: I will object to that as being incompetent, irrelevant and immaterial, and the matter is one which is privileged between attorney and client.

Mr. Baraty: Well, they brought out that he had an arrangement with his present lawyers. I would like to know if he had an arrangement with his first lawyers.

Mr. Emmons: That is superfluous.

Mr. Baraty: For the reason, your Honor, when reimbursement is attempted, it has got to be made within a reasonable time. If he is contending now that these are the gentlemen who were going to lend him the money, I would like to know if he had an arrangement when he filed a complaint, about a year [254] before they came into the case.

The Court: Well, I think the question is proper, but can't we get this examination closed? We are going over the same ground that has been gone over.

Mr. Baraty: This is something just brought out on redirect.

The Court: Well, he made the same statement in examination, if I remember rightly, that he had some arrangement with the lawyers that they were going to have to help him out.

Mr. Baraty: No, never said anything about that.

The Court: Somebody did.

Mr. Baraty: Somebody was going to help him out; he had some place of getting the money.

Mr. Emmons: That should be sufficient, your Honor; I think that is sufficient.

(Testimony of George H. Graham.)

Mr. Baraty: Well, it was just brought out fifteen minutes ago.

The Court: I will allow the question.

He wants to know whether you had an arrangement with the lawyers that you had when you filed the complaint that they would give you the money.

The Witness: No.

The Court: No.

Mr. Baraty: Now, about the flagman's responsibilities, you were not off duty while you were sitting in the caboose there on Track 20? [255]

Mr. Emmons: That has been asked and answered. A. No, I was not off duty.

Q. And you still had to take that train into the freight yard? A. Not necessarily.

Q. You still had to sign the law sheet that you were through with the work for the day?

A. How's that.

Q. You still had to sign the law suit that you were through with your work for the day?

A. Yes, but I may set out there for two or three hours before they pulled me in.

Q. You were still on duty while you were still in there, weren't you?

A. That's right, up to fifteen hours and thirty minutes.

Mr. Baraty: That is all.

Mr. Emmons: You may step down, that is all.

(Witness excused.)

Mr. Emmons: Mr. Syock.

ARTHUR RALPH SYOCK,

called on behalf of the Plaintiff; sworn.

The Clerk: Will you state your name to the Court and jury?

A. Arthur Ralph Syock. [256]

Q. Arthur Ralph Syock?

A. Yes, 595 Cibola, Needles, California.

Direct Examination

By Mr. Emmons:

Q. Is that C-e-b-o-l-a?

A. C-i-b-o-l-a.

Q. Mr. Syock, what is your occupation?

A. I am a switchman, a switch foreman.

Q. You are a switch foreman?

A. An engine foreman.

Q. Engine foreman. And for whom?

A. The Santa Fe.

Q. Santa Fe Railroad? A. Yes, sir.

Q. And are you presently retired?

A. Yes, sir.

Q. And were you connected with the Santa Fe Railroad on July 6, 1945? A. Yes, sir.

Q. At Needles, California?

A. That is right.

Q. What was your capacity at that time?

A. What was what?

Q. What was your capacity?

A. Switchman, see?

Q. Switchman? [257]

A. You see, switching trains, breaking up and making up trains.

Q. Now, how long have you been in the railroad business? A. Since 1902.

(Testimony of Arthur Ralph Syock.)

Q. Since 1902?

A. In the transportation.

Q. Forty-six years? A. That's right.

Q. And what did you start out as in the railroad business? A. Braking.

Q. Brakeman? A. Yes.

Q. And then did you become an engine foreman?

A. No, became a conductor, and then back to the switching district, and I went switching, engine foreman, yardmaster.

Q. I see. You have been an engine foreman and also a yardmaster? A. Yes, sir.

Q. Where were you an engine foreman?

A. I was an engine foreman on the Kansas City Terminal.

Q. I see.

A. And an engine foreman on the Santa Fe.

Q. At Needles? A. At Needles.

Q. And where were you a yardmaster?

A. At Kansas City Terminal and the Santa Fe, here at Needles. [258]

Q. At Seligman? A. At Seligman.

Q. In Arizona? A. That's right.

Q. Now, on the morning of July 6, 1945, at about 1:30 in the morning, were you in the area of the east end of the icehouse in Needles, in the Needles yard? A. Yes, sir.

Q. And on that morning, what, if anything, occurred there that attracted your attention?

A. Why, an engine had hit the rear end of a train on 20.

Q. An engine? A. Two engines.

(Testimony of Arthur Ralph Syock.)

Q. An engine struck the rear end of a train here; was it a caboose or what (indicating)?

A. It was a caboose.

Q. It was a caboose. Were there many cars in this track in this train? A. In 18?

Q. No, on 20.

A. Oh, on 20, there was a train in there, certainly.

Q. A train in there?

A. A train in there.

Q. Now, where were you standing, approximately?

A. I was standing right at the east end of the icehouse, [259] shoving into 70.

Q. Right about there (indicating)?

A. Right there.

Q. I will make a little "x" there. That would be about here, is that it (indicating)?

A. That's right.

Q. Now, did you see the impact? A. No.

Q. Did you see the—you heard the crash?

A. That's right.

Q. Did you see the engineer reverse his engine and pull away? A. Correct, sir; that's right.

Q. What happened to the caboose when that happened?

A. It fell down on the east end of the caboose, it fell down to the track.

Q. I see, the east end of this caboose fell down right onto the track? A. That's right.

Q. What happened to the trucks or the wheels of the caboose?

(Testimony of Arthur Ralph Syock.)

A. They was knocked off center, you see, they call that, loose underneath there.

Q. And what happened to the caboose in relation to the car next ahead of it?

A. It was shoved up on the freezer right ahead of it, reefer, on a forty-five degree (indicating).

Q. The refrigerator car?

A. Certainly, a refrigerator car.

Q. Now, can you tell me about how many car lengths the caboose would be from the east end of the icehouse, as it is drawn on there (indicating)?

A. Well, it was kind of an angle, southeast of—about three car lengths.

Q. About three car lengths this way from the east end of the icehouse?

A. That's right, that's correct.

Q. Now, can you tell me how many car lengths it would be from—let me ask you this first: Is there a spur track——

The Court: Well, counsel, there doesn't seem to be any dispute about these facts you are going into, as far as I can understand from counsel's statement, and I don't see much point in taking up the time of the Court and jury in going into them. The defense counsel in his statement admitted that the engine ran into these cars.

Mr. Emmons: Well, the admission of the fact of impact wouldn't be sufficient to show the negligence. The negligence comes in what the operators of the train did.

The Court: Yes, that is true.

(Testimony of Arthur Ralph Syock.)

Mr. Emmons: That is what I wish to establish.

The Court: Well, he has already testified that they ran into the caboose, and then backed away, and he has described [261] the position of it. What has the car lengths from the ice house and all that got to do with it?

Mr. Emmons: Well, after all——

The Court: I think we will save more time if you go ahead, but——

Q. (By Mr. Emmons): How many car lengths from the icehouse is it down to that spur track where the outfit cars are?

A. Oh, maybe fifteen to twenty.

Q. Fifteen to twenty cars?

A. Something like that.

Q. What was the condition of the caboose after the impact? A. It was badly damaged.

Q. It was. And what was the condition of this refrigerator?

A. It was badly damaged, they had to unload it.

Q. What was the condition of the front end of the engine?

A. The engine, the pilot was knocked off.

Q. What is the pilot?

A. The cowcatcher.

Q. The cowcatcher. Did you see Mr. Graham on that night? A. Yes, sir.

Q. And where was he when you saw him?

A. He looked like he had been up to the train, walked over, I walked over to him and said, "What is the matter, George, you been hurt?" He mum-

(Testimony of Arthur Ralph Syock.)

bled, king of groggy-like, you know, said "Uh-huh" (negative) just like that, see? [262]

Q. What was his appearance? Did he show any evidence of injury?

A. Why, his face was bleeding on the right side here (indicating), it bled all over his face, and he pulled his head around, I looked at it to see whether he was hurt bad, you know, and he was bleeding, and he kind of staggered away from me, see?

Q. Now, let me ask you this: Were there any lights on in the icehouse?

A. Oh, yes, it was lit up well.

Q. It was in a dark area or in a light area?

A. Oh, just big lights there and lights around there very much when they are on, see.

Q. I see. I take it that you are familiar with the Company Rules, are you? A. Fairly.

Q. And Rule 19-A, as I understand it, is that as long as a train is off the main track, the markers on the end of the caboose may be taken down or must be taken down; is that true?

A. That's right. When they are in, delivered to the yard or in clear of the main line, the markers must be taken down.

Q. I see. Now, in your opinion, and your knowledge of this area in here, if there is a train parked in this area, right along here on Track 20 (indicating), would it be necessary to keep yellow markers up on there? [262]

A. Oh, no, not necessarily. We see the cars in there lots of times. I have.

(Testimony of Arthur Ralph Syock.)

Q. Without yellow markers?

A. Without any markers at all, yes, switching.

Q. Is it necessary that before a man enters the service, that you have to pass an examination in regard to Company Rules? A. Yes, sir.

Q. And are you familiar with Rule 304?

A. Yes, sir.

Q. In regard to the matter of obtaining a release from the company in regard to injuries?

A. Yes, sir.

Q. Is that rule usually included in that examination? A. Yes, sir.

Q. Now you have stated that you have been a yardmaster at Seligman for the Santa Fe Railroad. As a yardmaster——

Mr. Baraty: Did he say yardmaster?

Q. (By Mr. Emmons): Did you say yardmaster?

A. At Seligman, yes, I was a yardmaster.

Q. Did you ever see or hear of an abrogation of Rule 304? A. Yes, sir.

Q. You have? When did this take place?

A. Oh, just——

Q. Now, what I mean by an abrogation, is that it has been rescinded and taken off the books. [264]

A. Oh, no, I have never heard of that.

Q. You have never heard of that? A. No.

Q. In other words, is it your opinion that the rule is still in force and effect today?

Mr. Baraty: Well, we object to that as calling for the opinion and conclusion of the witness; it is

(Testimony of Arthur Ralph Syock.)

not for him to decide whether it is in full force and effect.

The Witness: It is still in the book of rules.

The Court: I will sustain the objection.

Mr. Emmons: Let me ask you this: Is it still in the book of rules?

A. It is still in the book of rules.

Mr. Baraty: We have stipulated to that.

Q. (By Mr. Emmons): Now, Rule 93, as I take it, Mr. Syock, states that an approaching train within yard limits must do two things, it must proceed at a restricted speed, and secondly, being an approaching train, it is responsible for all collisions?

Mr. Baraty: Your Honor, this rule speaks for itself.

A. That's correct.

The Court: Yes, all you are doing is restating the rules to the witness, counsel. They are already in evidence.

Q. (By Mr. Emmons): Now, Mr. Syock, in your opinion as a railroad man, would two engines approaching here striking the [265] rear end of a caboose, would they have violated Rule 93?

Mr. Baraty: Your Honor, that is for the jury to determine.

A. Yes, sir.

Mr. Baraty: I object to that as involving the invasion the province of the jury.

The Court: The answer may go out, the objection is sustained.

(Testimony of Arthur Ralph Syock.)

Q. (By Mr. Emmons): When did you go to work for the Santa Fe?

The Court: What difference does that make, counsel?

Mr. Emmons: Well, in regard to this rule, is all, your Honor—just two questions.

A. Latter part of '44.

Q. In 1944? A. Uh-huh (affirmative).

Q. And you were given a book of rules at that time? A. Yes, sir.

Q. Was Rule 304 in effect then?

A. Yes, sir.

Mr. Emmons: I have no further questions.

Cross-Examination

By Mr. Baraty:

Q. How long have you worked for the Santa Fe?

A. In '44, latter part of '44 until '45.

Q. How long did you work for them?

A. Well, from 1944 until the latter part, about seven months, in there. [266]

Q. And did you retire or quit, or what happened? A. I resigned.

Q. And are you employed as a railroad man now? A. Sir?

Q. Are you employed as a railroad man now by any other company?

A. No, I am retired now.

Q. Have you ever worked for the Southern Pacific? A. Yes, sir.

Q. When was it, when was the last time?

A. It was in December of '45.

(Testimony of Arthur Ralph Syock.)

Q. You got an action pending against the Southern Pacific Railroad now for personal injuries, pending in Chicago, haven't you?

A. That's right, that's correct.

Q. Now, concerning Rule 304, have you ever had any opportunity to consider that rule because of any injuries to yourself?

A. I am a little hard of hearing.

Q. Excuse me. Has that particular rule ever come under your observation personally?

A. No, sir.

Q. And did I understand you to say you were yardmaster or yardman?

A. I was a yardmaster at Seligman and an engine foreman at Needles. [267]

Q. How long at Seligman?

A. I was up there about six months.

Q. And during your employment with the Santa Fe, you were never brought into a discussion personally of Rule 304, as to anything that occurred to you?

A. (Shook head in the negative.)

Q. Now, you didn't see this accident, of course? You did not see the accident?

A. No, I heard it. I was standing with my back turned when they hit, you see.

Q. And did you walk over to the caboose, or did Mr. Graham come over where you were?

A. I walked over to the caboose.

Q. And his face was bleeding?

A. Bleeding on his right side here (indicating).

(Testimony of Arthur Ralph Syock.)

Q. Was he walking around unassisted?

A. Yes, kind of staggering around, you know.

Q. Did you see him leave the place?

A. No, I went over and got and shoved in on 17 then.

Q. And did you——

A. Excuse me, wait a minute.

Q. Excuse me, sir, I am very sorry.

A. And cut my engine over and down through 18.

Q. Did you advise him to go to the hospital for this blood that was on his face?

A. Why, you couldn't talk to him, he was kind of groggy, see. [268]

Q. Did he say whether or not he wanted to go to a hospital?

A. Never said a word. He just mumbled something to me and was standing there, and the engineer and fireman on the other job, you know, had ahold of him there, and I supposed that they was going to take care of him.

Q. And so in his groggy condition, you left him alone anyway? A. Yes.

Q. On his own? A. Sir?

Q. On his own, by himself?

A. No, with the engineer and the fireman off of them other two engines that was there.

Q. The men that he was having this argument with?

A. I don't know anything about the argument. Never heard it.

(Testimony of Arthur Ralph Syock.)

Q. You never heard about his argument with the enginemen of these two engines? A. No.

Q. Haven't you been sitting in the courtroom for two days?

A. All I have heard was said here in the courtroom.

Q. You heard it mentioned here?

A. Oh, but down there, I thought you meant down there.

Q. Oh, I see. Now this matter of taking down or leaving up of markers, markers always are helpful, are they not, on the rear end of a standing train?

A. Well, I have seen them taken down there just numerous times, [269] just the same—when ever they head-in on 20 there, they take them down.

Q. You have seen them up there in 20, haven't you, too? A. Yes; well, it works both ways.

Q. So my question, I am coming back to the question: Aren't markers, displaying markers, helpful at night, always helpful in a situation like existed here?

A. Oh, I wouldn't say so, if a man was watching, you know, looking out for things ahead. You will head through those yards any place in Needles, any place, without markers being up and come again them and stop.

Q. Well, you know that this was on a curve and part of the curve is obscured?

A. It didn't make any difference whether there was train or not—when those markers are taken off, they are not a train.

(Testimony of Arthur Ralph Syock.)

Q. Well, will you say this, that markers are helpful in cases, and in other cases they are not?

A. Well, I don't see where they need them there.

Q. But they do leave them up there on 20?

A. Sometimes, and sometimes they don't.

Mr. Baraty: That is all.

Mr. Emmons: No further questions.

The Court: That is all.

(Witness excused.)

Mr. Emmons: Now, will counsel stipulate that on November 25, [270] of 1946, our office sent a letter to Messrs. Sievert and Ewing, attorneys for the Santa Fe Railroad in Los Angeles?

Mr. Baraty: Let's see the letter. Maybe we can tell (examining). Yes, we will stipulate that that was sent and that we received it.

Mr. Emmons: And I would like to offer in evidence, a letter dated November 25, 1947, directed to Messrs. Sievert and Ewing, Attorneys at Law, 121 East 6th Street, Los Angeles, and may it be admitted in evidence, your Honor?

The Court: All right.

The Clerk: Plaintiff's No. 5.

(Letter dated 11/25/47 referred to above was received in evidence as Plaintiff's Exhibit No. 5.)

Mr. Baraty: We received that letter in our office in San Francisco. We admit the receipt of it.

Mr. Emmons: I would like to read this to the jury (reading).

“November 25, 1947.

“Messrs. Sievert and Ewing,
Attorneys at Law
121 East 6th Street,
Los Angeles, California.

Re: Graham vs. Santa Fe Railroad
Gentlemen: [271]

“Enclosed please find file-marked copy of Substitution of Attorneys in the captioned case, wherein this office replaces Emmett R. Burns, Esq., as attorney of record.

“Also enclosed, please find a Notice of Rescission of Release and Offer to Restore Consideration executed by Mr. Graham. Kindly advise us of your wishes in this respect.

“Very truly yours,

PHILANDER BROOKS BEADLE,
By “.....”

This letter, I wrote myself, personally.

Mr. Emmons: Now, I would like to read from 41 Corpus Juris, Page 216, American Experience Tables of Mortality: The life expectancy of Mr. Graham. For the age 49, it is indicated as 21.63.

Mr. Baraty: Well, we will object to that.

The Court: You mean that a person forty-nine years of age, according to the table, has a life expectancy of 21.63?

Mr. Emmons: Yes, 21.63.

Mr. Baraty: Well, I think if that is going to be considered, the various other ages that are before the Court should now likewise be read.

The Court: Well, you can offer that.

Mr. Baraty: Well, we might as well have it all at once. [272]

Mr. Emmons: There are no other ages in evidence, your Honor.

Mr. Baraty: Oh, yes, we have; that has been accepted.

The Court: Any other evidence of the plaintiff?

Mr. Emmons: No, your Honor.

The Court: The plaintiff rests?

Mr. Emmons: Yes, your Honor.

(The plaintiff rested.)

The Court: Any motions?

Mr. Baraty: We would like to direct a legal matter to your Honor's attention, if you can bear with us a little while.

The Court: The jury may take a recess a little earlier today. Please bear in mind the admonition of the Court.

(Jurors retired from the courtroom, and the following occurred outside the presence of the jury.)

Mr. Baraty: Your Honor, the defendant now moves for a judgment of dismissal in its favor on the grounds that there is no sufficient evidence before the Court——

The Court: You want a directed verdict?

Mr. Baraty: A directed verdict, yes. There is no sufficient evidence now before the Court to overcome a validity of this release, which there is no evidence to show was obtained by fraud, by duress, by undue influence. It is a release in full for all known and unknown injuries.

(Whereupon counsel for the respective parties argued the [273] motion.)

The Court: Any further argument in this matter? Anything further that you wish to say, Mr. Emmons?

Mr. Emmons: No, your Honor.

The Court: We will take a five-minute recess, and then return the jury.

(Short recess, following which the jury resumed its position in the jury box, and the following occurred in the presence of the jury.)

The Court: The defendant in this case has moved the Court to direct a verdict in favor of the defendant. The grounds of the motion are that no issue of fact with respect to the second and separate defense raised by the answer requires a decision by the jury. The second separate defense raised by the answer is that the plaintiff and defendant, on the 1st day of October, 1945, entered into a mutual agreement by which all claims arising out of this accident on the part of the plaintiff were released and discharged upon the payment to and receipt by the plaintiff of a sum of \$1,050.

In the opinion of the Court, the evidence presented on behalf of the plaintiff, who has submitted his cause, raised no question of fact that requires resolution by the jury. On the contrary, it is my opinion that the evidence discloses that no circumstances presented by the evidence and recognized by the law requires any change or rescission of the agreement that the [274] parties entered into on the 1st day of October, 1945.

The evidence shows that this agreement was entered into under no compulsion, for a fair consideration, and that both parties had in mind the consideration as that related to the purposes and objects of the agreement.

Furthermore, no timely rescission or attempted rescission of this agreement is shown by the evidence. The evidence does not disclose any factual matter with respect to any mistake or fraud or undue influence in connection with the execution of this agreement.

Consequently, there is nothing for the jury to pass upon. The Court finds that there are no circumstances of any kind disclosed by the evidence to justify the rescission of this settlement, which appears to have been a fair and equitable one, and not made under mutual mistake of any kind at the time, or induced by any fraud or undue influence.

For the reasons that I have stated, the motion for a directed verdict will be granted.

This will require me, ladies and gentlemen, to appoint a foreman of the jury for the purpose of filing a formal verdict. The Court will appoint Mr. Turner, Number 1 juror, as the foreman, and I will ask the juror to sign the form of directed verdict.

I do this, ladies and gentlemen, because, while the decision which the Court has made takes the case out of the hands of the [275] jury and is really the decision of the Court, there are some holdings by our higher court to the effect that there

should be a formality of filing a verdict. I am not in agreement, myself, with that holding of the higher court, because I consider that it is folderol to require that; but I nevertheless feel that as a lower court judge, I must resolve that doubt in favor of those who rule higher up.

(Form of directed verdict was handed to Mr. Turner, who signed the same.)

The Court: That is why I have appointed a foreman and required the foreman to sign the verdict.

The Court has decided this case as a matter of law, and thus there is nothing further for the jury to do in the case.

Now, let me say to you that you shouldn't feel chagrined or disturbed because you haven't had an opportunity to pass upon the case. You have performed just as valuable service by being here in the event that the decision should be required as if you had yourself decided the case.

But at any rate, there is nothing you can do about it now, because the Court has decided the case. The members of the jury may be excused until you are notified to attend.

(Whereupon, at 3:54 o'clock p.m., the jury was excused and left the court room.)

The Court: The clerk is directed to file the verdict signed by the jury in the records of the case. [276]

CERTIFICATE OF REPORTER

I, Eldon W. Rich, Official Reporter, pro tem, certify that the foregoing 277 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to type-writing to the best of my ability.

[Endorsed]: Filed Oct. 29, 1948. [277]

[Endorsed]: No. 12099. United States Court of Appeals for the Ninth Circuit. George H. Graham, Appellant, vs. Atchison, Topeka and Santa Fe Railway Company, a Corporation, Appellee. Transcript of Record. Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed November 24, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12099

GEORGE H. GRAHAM,

Appellant,

vs.

THE ATCHISON, TOPEKA & SANTA FE
RAILROAD, a Corporation,

Appellee.

DESIGNATION OF POINTS ON WHICH AP-
PELLANT WILL RELY ON APPEAL
HEREIN

On appeal to the United States Court of Appeals for the Ninth Circuit, the appellant herein will rely upon the following points:

I.

The uncontradicted evidence adduced at the trial established

[a] Appellee's liability as a matter of law, and

[b] That the release pleaded in appellee's answer is invalid as a matter of law.

II.

The District Court erred in directing a verdict in favor of appellee.

III.

The District Court erred in holding that the release signed by appellant was, as a matter of law, a bar to this action. Even if appellant's point I,

supra, were not well taken, the evidence a least presented the following questions of fact, which should properly have been submitted to the jury:

1. Whether the acts of the appellee in dealing with appellant constituted fraud;

2. Whether there was a mutual mistake of a material fact at the time of execution of the release;

3. The nature, extent, exacerbation and permanency of appellant's alleged injury;

4. Whether appellant knew or suspected the nature, extent, exacerbation or permanency of his alleged injury; and

5. Whether appellant had effectively rescinded the release.

IV.

The District Court erred in refusing to permit counsel for appellant on direct examination to put to appellant the question whether appellant "knew or suspected" that he had suffered a permanent spinal injury at the time he signed said release.

Dated: December 16, 1948.

/s/ PHILANDER BROOKS

BEADLE,

/s/ ERNEST E. EMMONS, JR.

Attorneys for Appellant.

[Endorsed]: Filed December 16, 1948. Paul P. O'Brien, Clerk.

